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In the Supreme Court of the United States

Carole Keeton Rylander, Comptroller of
Public Accounts of the State of Texas, and
John Cornyn, Attorney General of the State of Texas,
Petitioners,

v.

The Dow Chemical Company,
Respondent.

On Petition for Writ of Certiorari to
the Third Court of Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) May a State, consistently with the Due Process Clause and the McCarran-Ferguson Act, tax a corporation doing business in the State on the localized value of insurance procured by it to cover its risks located in the State without regard to connections between its insurers and the taxing State?

(2) Should the Court explicitly overrule its decision in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962)?

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No. _____

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PETITION FOR A WRIT OF CERTIORARI

Relying explicitly and solely on this Court's decision in *State Board of Insurance v. Todd Shipyards Corp.*, the Texas Third Court of Appeals held that a corporation may have millions of dollars in property and business activities within a State and yet pay no tax on the insurance it purchases to cover its risks of loss within that State. It matters not that the State provides a full range of benefits and protections to those business interests on a daily basis. Provided the corporation takes its insurance negotiations and payments out of State—activities that have little or no connection to the value of the insurance itself—the corporation pays no tax on the insurance in that State or, most likely, in any other.

The scope of State authority to regulate and tax the business of insurance is an issue of great importance to all States. More than two-thirds of the States tax independently procured insurance. In the McCarran-Ferguson Act, Congress ceded broad authority to the States to regulate and tax the business of insurance subject only to constitutional limitations, such as the Due Process Clause, and to federal legislation that specifically relates to the business of insurance. *Todd Shipyards* and the decision in this case are at odds with this Court's Due Process jurisprudence and with its more recent decisions construing the McCarran-Ferguson Act. State courts are conflicted and uncertain about *Todd Shipyards*' current validity and even its analytical basis.

If the decision below properly interprets the law, then: (1) States will lose tax revenue; (2) corporate insureds will have an incentive to move their insurance coverage offshore, adversely and unfairly affecting the States' licensed insurance markets; and (3) regulatory authorities will see their recent efforts to establish a more rational nationwide allocation system for insurance taxes thwarted by the resurrection of a doctrine with no sound constitutional or statutory underpinnings. *See* National Association of Insurance Commissioners (NAIC) Model Regulation V-872-1, Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks (1996) *and* Robert M. Mangino, et al. *Recent Developments in Excess Insurance, Surplus Lines Insurance, and Reinsurance Law*, 36 Tort & Ins. L.J. 309, 317 (Winter 2001).

Petitioners Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas (the State), respectfully ask the Court to grant a writ of certiorari to review the court of appeals' judgment. Only this Court can resolve these important issues regarding federal limitations on the States' authority to tax the business of insurance.

OPINIONS BELOW

The Texas Third Court of Appeals' opinion is published at 38 S.W.3d 741 and is reprinted in the appendix at A2-12. The Texas Supreme Court denied the State's Petition for Review on June 7, 2001. The order is noted at 44 Tex. S.Ct.J. 797 (June 9, 2001) and is reprinted in the appendix at A13-14.

STATEMENT ON JURISDICTION

The Court has jurisdiction to review this case under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV §1

No State shall ... deprive any person of life, liberty, or property without due process of law.

McCarran-Ferguson Act

15 U.S.C. §1011

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. §1012(a)

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. §1012(b)

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

TEX. INS. CODE §101.252(a), (b)[1]

Except as provided by Subsection (f), an insured who procures insurance in accordance with Section 101.053(b)(4), or another person designated by the insured, shall:

(1) file a report with the comptroller; and

(2) pay an independently procured insurance tax of 4.85 percent.

(b) If a policy covers risks or exposures only partially located in this state, the tax payable is computed on the portion of the premium that is properly allocated to a risk or exposure located in this state.

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[1] Sections 101.252 and 101.053 are derived from former TEX. INS. CODE art. 1.14-1 §12, which was in effect during the period in issue and which was recodified with only minor changes not pertinent to this dispute. *See* Act of May 12, 1967, 60th Leg., R.S., ch. 185, §1, *amended by* Act of May 18, 1995, 74th Leg., R.S., ch. 279, §1, *repealed by* Act of April 23, 1999, 76th Leg., R.S. ch.101, §5.

(f) This section does not apply to premiums for individual life or individual disability insurance.

TEX. INS. CODE §101.053(b)(4)

(b) Sections 101.051 and 101.052[2] do not apply to:

(4) a transaction:

(A) that involves an insurance contract independently procured through negotiations occurring entirely outside this state;

(B) that is reported; and

(C) on which premium tax is paid in accordance with this chapter.

STATEMENT OF THE CASE

The Dow Chemical Company is a major corporation doing substantial business in Texas and in many locations throughout the world. Dow Chemical purchased various insurance policies to cover hundreds of millions of dollars of risks in Texas and elsewhere. State's motion for summary judgment excerpts, App. B18, 27, 44, 46. With some exclusions, the policies covered primary or excess liability for a wide variety of losses. The insured risks include personal injury, pollution, property damage, water damage, payroll, defective products and advertising. *Id.* at B25, 38, 48-49, 63-67 Some policies covered Dow Chemical's employees and their property, as well as the property of other persons on Dow Chemical's premises. *Id.* at B49. Dow Chemical admits that it does business in Texas and does not contest the amount of premiums allocated to Texas. *Id.* at B6-7.

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[2] These sections define acts which subject the insurance to State regulation. Independently procured insurance is thus exempted from regulations or sanctions that might otherwise apply.

Some policies provided that Dow Chemical's insurers could inspect its property, participate in the investigation and defense of claims, appeal adverse judgments, and use local courts for some purposes. There is, however, no evidence that Dow Chemical's insurers or their agents ever were licensed or present in Texas, or that any payments or correspondence were made to or from Texas regarding the policies. The insurance was negotiated and paid for through Dow Chemical's corporate headquarters in Michigan. *Id.* at B8-17. The insurance was placed through Marsh (Dow Chemical's insurance broker, with offices in Michigan and Bermuda) with insurers in Bermuda or was written directly by Dow Chemical's insurance subsidiaries, Dorintal and Timber. *Id.*

The State levied independently procured insurance tax against Dow Chemical for the premiums paid to cover its risks in Texas for the period from January 1, 1991 through December 31, 1997. TEX. INS. CODE §101.252. Dow Chemical paid the tax under protest, contending that the State lacked authority to impose the tax in view of *Todd Shipyards*. Dow Chemical's motion for summary judgment, App. C1-5. Dow Chemical contended that *Todd Shipyards* construed the McCarran-Ferguson Act, but that the district court was required to follow the direct Supreme Court precedent in any event. *Id.* The State contended that *Todd Shipyards* was a Due Process case, expressly following older decisions under the rule of *stare decisis*, that had been overruled by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). State's motion, App. at B3-4. The State also contended that Dow Chemical's insurance had sufficient contacts with Texas to justify the tax under Due Process even if *Todd Shipyards* were still good law. *Id.* at B2-3. The State has openly and consistently administered the independently procured insurance tax as it was applied in this case over a long period of time. *Id.* at B73-75. The State has collected several million dollars annually and collected $7,351,436 from 2537 different taxpayers in 1998. *Id.*

The district court granted the State's motion and denied Dow Chemical's motion without opinion. App. at A15-16. The court of appeals reversed and rendered judgment as a matter of law for Dow Chemical, concluding that *Todd Shipyards* controlled the case and that the independently procured insurance tax violated the McCarran-Ferguson Act. *Dow Chemical Co. v. Rylander*, 38 S.W.3d 741, 744-45 (Tex. App.—Austin 2001, pet. denied); App. at A2-12. The court of appeals, feeling bound by *Todd Shipyards*, declined to consider developments in the law of Due Process or other cases construing the McCarran-Ferguson Act over the last forty years. Id. The Texas Supreme Court denied review of that judgment. *Id.*; 44 Tex. S.Ct.J. 797 (June 9, 2001). App. at A13-14.

REASONS FOR GRANTING THE WRIT

In denying the State's authority to tax the localized value of insurance for a corporation doing business in the State, the court of appeals perpetuated an anomaly in Due Process law and in the construction of the McCarran-Ferguson Act. Due Process in taxation requires: (1) that a State provide some benefit or protection justifying the tax, (2) that the State have nexus or some minimal connection with the person or thing subject to tax, and (3) that the values subjected to tax be rationally connected to the taxing State. All of these elements are easily identified in this case. Texas provides many benefits and protections to Dow Chemical. It has a nexus with Dow Chemical and with the subjects of its insurance. The premiums Dow Chemical paid to insure Texas risks rationally measure the local value of that insurance. The tax here is functionally similar to a use tax, taxing a purchaser on localized value even if the sales transaction itself may occur outside the State's jurisdiction. A State may tax intangible values when they may be fairly allocated to that State.

The McCarran-Ferguson Act put the full weight of Congress' authority behind the continued regulation and taxation

of the business of insurance by the several States. Congress intended, and this Court has held, that the Act created a special anti-preemption rule to avoid inadvertent federal interference with State authority over the business of insurance. The plain language of the Act contains no limit on that authority. Letting the perceived whispers of inconclusive legislative history overcome the plain language of the Act, as the court of appeals has done by continuing to follow *Todd Shipyards*, turns the Act into an oxymoron of the highest order and frustrates Congressional intent.

Todd Shipyards should be explicitly overruled. It is an anomaly with no real support in the constitutional law of Due Process or in the McCarran-Ferguson Act. *Todd Shipyards* affirmed the Texas courts that followed earlier Due Process decisions of this Court.[3] *See State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), *aff'g State Bd. of Ins. v. Todd Shipyards Corp.*, 340 S.W.2d 339 (Tex. Civ. App.—Austin 1960) *writ ref'd n.r.e.* 343 S.W.2d 241 (Tex. 1961) (per curiam). It invalidated the independently procured insurance tax where the location of the insured risk was the only connection between the taxing State and the insurer or its insurance contracts. *Id.*, 370 U.S. at 454-55, 458. *Todd Shipyards*, however, approached the issues in the case not only as a part of the Court's ongoing analysis and application of Due Process principles, but also as a part of "the design that Congress fashioned" in the McCarran-Ferguson Act. *Todd Shipyards*, 370 U.S. at 458. In taking an uncertain middle ground between a Due Process analysis of the taxability of an insured and the statutory construction of the McCarran-Ferguson Act as applied to State taxation, the *Todd Shipyards* Court

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[3] "We are of the opinion that the decision in this case is controlled by *Allgeyer v. State of Louisiana*, 165 U.S. 578 and *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346." *State Bd. of Ins. v. Todd Shipyards Corp.*, 343 S.W. 2d 241, 242 (Tex. 1961) (parallel citations omitted)

produced a result without a sound analytical basis on either ground. Moreover, it has generated conflict and confusion among State courts and threatens to stymie a variety of efforts to establish a more balanced system for taxing the business of insurance.

I. The court of appeals' decision, following *Todd Shipyards*, conflicts with this Court's Due Process jurisprudence in State tax cases.

The Court's view of constitutional limitations on State taxation has changed over the years. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (examining the practical effect of a tax to determine its constitutionality under the Commerce Clause). *Complete Auto* did away with the formalistic rule that prohibited State taxation of interstate commerce if "the incidence of the tax is the 'privilege of doing business.'" *Id.* at 278 (*disapproving Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288. In doing away with the *Spector* rule, the Court announced a new rule for all future Commerce Clause tax cases and "moved toward a standard of permissibility of state taxation based upon its actual effect." *Id.* at 281. This case does not involve the Commerce Clause, but it does involve the same retreat into formalism and disregard of economic reality that this Court has consistently opposed in testing the constitutional limits of State taxation.

State taxing authority is, and will always be, limited by the fundamental concerns of constitutional Due Process. The Court's views of Due Process, like its views of the Commerce Clause, have changed over the years. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 196-212 (1977) (reviewing and rejecting the Due Process jurisdictional reasoning of *Pennoyer v. Neff*, 95 U.S. 714

(1878)). In this case, the court of appeals disregarded those evolving views and opted to retain a formalism rejected elsewhere. State taxation of insurance should be measured by the same practical and rational standards that apply to taxation of every other kind of value, but only this Court can assure that it will.

Because few, if any, cases specifically discuss the Due Process principles applying to the taxation of insurance, it may be helpful to consider those principles in other tax contexts. The Court's most recent decisions on Due Process in taxation reaffirm that Due Process requires the value subjected to tax to be rationally connected to the taxing State. *See Hunt Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458 (2000). This question often arises when a State seeks to tax the "unitary" income of a non-domiciliary corporation doing business both inside and outside the State. *Id.* at 460. Courts must inquire whether "there is a minimal connection or nexus between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise" in order "to tax income arising out of interstate activities." *Id.* at 464 (internal citations and quotation marks omitted). If these are lacking, the "nonunitary" income may only be taxed by the corporation's domiciliary State, unless there is some other connection between the taxing State and the income. *Id.*

Unlike the hypothetical Illinois tin can manufacturer and the New Zealand sheep farming subsidiary in *Hunt Wesson*, Dow Chemical pays premiums that are directly related to its business activities in Texas rather than as part of an unrelated and discreet business enterprise. *Cf. Allied Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778-82 (1992) (intangible asset was not attributable to activities within the taxing State). This closely connected value is why States generally tax insurance premiums based on location of the risk. The Court should reaffirm that the source of taxable value is meaningful to an inquiry on the Due

Process limits of taxation. Intrastate activities, such as negotiating and paying for insurance, that are unrelated to generating value to the insured should not control.

In *Quill*, this Court announced that "we have abandoned more formalistic tests" for Due Process. *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992). "[O]ur modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection." *Allied Signal*, 504 U.S. at 778. The court of appeals' decision in this case, doggedly following *Todd Shipyards* and ignoring the teachings of *Hunt Wesson* and *Quill*, reinvigorates the Due Process formalism of another era. The court determined that "a due-process analysis is unnecessary" and declined to consider whether *Quill*'s rejection of formalisms, such as a physical presence requirement for Due Process, should also apply to the insurance tax in this case. *Dow Chem.*, 38 S.W.3d at 746.

Instead of looking to practical economic realities, the court of appeals relied on the *Todd Shipyards* laundry list of contacts between Texas and Dow Chemical's insurers. *Id.* While these contacts would surely be relevant to a tax assessed against the insurers, the State is not taxing them. Dow Chemical, of course, has nexus with Texas. In this case the State taxes Dow Chemical on its insurance rather than its income. The activities and contacts of insurers in the taxing State form a Due Process basis to tax the properly allocated or apportioned value of the premiums they receive. The same activities and contacts that generate this income stream to insurers, however, have little or no real economic connection to the value of Dow Chemical's insurance to Dow Chemical.

"[A]rriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983). The task is not difficult in this case. Insurance taxes generally allocate

premiums for tax purposes according to the location of the risk. It is undisputed that the premiums taxed in this case were properly allocated to Texas. An insurance tax based on location of the risk satisfies the Due Process requirement that the tax base "must be rationally related to values connected with the taxing State;" otherwise, this widely accepted method of allocating taxable value may be unconstitutional. *Quill*, 504 U.S. at 306 (internal quotations and citation omitted).

The rationale for taxing an insurance consumer on this basis should be evident. The value of insurance to an insured does not arise out of its "activities" in obtaining the insurance. The substantial premiums paid by Dow Chemical, on which tax was imposed, arise out of Dow Chemical's substantial property and business interests in Texas that the insurance was bought to protect. Dow Chemical's insurance has value, not because premiums were negotiated and paid from its Michigan headquarters or because many of the policies were placed with Bermuda insurers, but because the premiums protect its substantial property and business in Texas.

An income tax may reach income from intangible assets, if the intangible value has an operational rather than merely an investment function. *Allied Signal*, 504 U.S. at 787. Assuming that a similar Due Process test applies to a tax on the value of insurance to an insured, it should also be obvious here that Dow Chemical's substantial insurance coverage is not some investment to be bought and sold. Instead, it is intimately connected with Dow Chemical's substantial business operations in Texas.

The Court has also considered problems of geographic allocation of taxable value for other taxes, such as the value added tax. "We can accept the premise that apportionment is permitted only when precise geographic measurement is not feasible, for to allow apportionment where there is no practical or theoretical

justification could provide the opportunity for a State to export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). *Trinova* held that the three-part tax base in Michigan's single business tax was rationally allocated and apportioned. *Id.* at 376-82, 387. The key, as usual, was whether the values taxed by the State had some theoretical and practical source in the State. The factors to look at in making that decision should be those "*by which value is generated.*" *Id.* at 381 (emphasis original) (quoting *Container Corp.*, 463 U.S. at 183 (emphasis added)).

In this case, taxable value was allocated to Texas under the well established and widely accepted method of location of the risk. The Texas property and business interests that Dow Chemical protects with its insurance are inextricably connected with Texas. Insurers doing business in Texas pay Texas tax on Texas risk because it is an obviously rational measure of the value of business they do in the State. Dow Chemical should pay tax on its insurance covering Texas risks because its real economic value is just as inextricably connected with Texas as the property and business interests that Dow Chemical has insured. The practical and theoretical Due Process justification for allocating this value for the insured is just as sound as it is for the insurer.

The tax in this case is similar to the commonly accepted "use" tax, in which tax is imposed on the rights of ownership of a purchased item rather than the sales transaction itself. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Rather than purchasing physical property for use in Texas, Dow Chemical has purchased an important set of intangible rights protecting its substantial property and business interests in Texas. Of course, Dow Chemical and all concerned hope that it will not have to "use" its insurance, but the intangible value is real. A "use" tax ordinarily would have to meet the stricter test applying to compensatory taxes on goods or other intangibles because of the

dormant or negative restrictions of the Commerce Clause. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333-34 (1996). Even though the McCarran-Ferguson Act eliminates that test for this tax, the test could be met because the rate is the same for similar insurance transactions and business occurring within the State as it was for Dow Chemical in this case. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981). TEX. INS. CODE §101.251, art. 1.14-2 §12(a).

The State taxed Dow Chemical initially on "the obligation, chose in action, or right represented by the premium charged for [independently procured] insurance." Act of May 12, 1967, 60th Leg., R.S., ch. 185, §1 (former TEX. INS. CODE art. 1.14-1 §12(c) *amended by* Act of May 18, 1995, 74th Leg., R.S., ch. 279, §1). The standards for taxing intangible value have not been immutable, but the Court has long recognized that States may tax the intangible values of corporations and that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." *Pacific Express Co. v. Seibert*, 142 U.S. 339, 351 (1892). The Court has even recognized that, because it will often be difficult to establish an exclusive taxable situs for intangible value, intangibles may be subject to tax in more than one State. *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 179-80 (1942). Little or no threat of overlapping taxes exists in this case, because the location of the risk rule allocates value geographically in a way that is often not feasible for other intangible values.

According to the court of appeals, however, *Todd Shipyards* prohibits the tax in this case even though it otherwise comports with Due Process. *Dow Chem.*, 38 S.W. 3d at 747. *Todd Shipyards* is the direct descendant of *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922). That case, following *Allgeyer* and the *Child Labor Tax Case*, held that the State's tax on a consumer of insurance was actually a prohibition that, in turn, violated the Due Process Clause. 260 U.S. at 348

(citing *Allgeyer v. Lousiana*, 165 U.S. 578 (1897) *and Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (*The Child Labor Tax Case*)). In accordance with the wisdom of the time, the Court evidently saw the tax in *St. Louis Cotton Compress* as an improper exercise of regulatory police power rather than a true exercise of the taxing power. "The short question is whether this so-called tax is saved because of the name given to it by the statute." *St. Louis Cotton Compress*, 260 U.S. at 348. "[T]he State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside." *Id.* at 349.

Texas does not prohibit Dow Chemical's procurement of insurance from out-of-state insurers. Texas does not attempt to regulate Dow Chemical's extraterritorial insurance activities any more than it would seek to apply its deceptive trade practice or licensing laws to an out-of-state vendor when collecting use tax from a corporation doing business in the State. On the contrary, Texas recognizes that such transactions may take place and exempts the non-admitted insurer from Texas regulation over its insurance business if the insurance consumer pays the independently procured insurance tax. TEX. INS. CODE §101.053(b)(4). This "so-called tax" is just a tax. *St. Louis Cotton Compress*, 260 U.S. at 348. No theory has been articulated as to why the independently procured insurance tax would fail today's constitutional Due Process test for taxation.

The fundamental Due Process question remains "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Texas benefits Dow Chemical by providing services and protections directly related to the risks that Dow Chemical has insured against. The capable workforce, sound

infrastructure, and safety and emergency services provided to Dow Chemical in Texas are more than enough to justify the independently procured insurance tax under the standards of Due Process.

Moreover, it is odd that the *Todd Shipyards* and *Dow Chemical* Courts gave no greater weight to the fact that both Todd Shipyards and Dow Chemical did substantial business within the State where tax was imposed and were given the same rights as are given to the State's domestic corporations. The ordinary rule is that corporations domiciled in other States but doing business within the State must be given equal treatment. *See, e.g., WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968). A State may discriminate against its own residents, but there should be some rational basis for doing so. *See Allied Stores of Ohio, Inc., v. Bowers*, 358 U.S. 522 (1959). As with the use tax, the independently procured insurance tax is an effort to draw revenue directly or indirectly from all insurance consumers, not just those who buy their policies locally. To impose discrimination by prohibiting taxation of this localized value furthers no valid practical or constitutional theory of State taxation.

Arguably, an unspoken tax theory of *St. Louis Cotton Compress* may be that insurance is taxable only at the place of contract or the domicile of the insured. *See Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507-08 (1926) (characterizing *St. Louis Cotton Compress* as a case involving attempted taxation of property outside the State) *and Aldrich*, 316 U.S. at 178-80 (discussing the theory behind taxing intangibles). If so, that theory is misapplied to insurance taxation here because a rational geographic allocation of the intangible value can be made. If that common method of value allocation cannot be used, then could the insured's domiciliary State tax the whole of the intangible value, as with "nonunitary" income? *See Hunt Wesson*, 528 U.S. at 464. Could the State where the insurance is negotiated and paid, or

where the physical policy is found, tax the whole value? *See Curry v. McCanless*, 307 U.S. 357, 366-70 (1939) (discussing taxation of intangibles). The intangible value of insurance is extremely important to virtually every business and to every State. The Court should articulate the Due Process principles by which the value in this case may be constitutionally taxed.

II. The court of appeals' interpretation of the McCarran-Ferguson Act conflicts with this Court's jurisprudence construing that Act.

Few federal statutes are more significant to the States than the McCarran-Ferguson Act. If *Todd Shipyards* is in fact a case construing the McCarran-Ferguson Act, then it is at odds with the plain language of the Act and with this Court's subsequent decisions construing it. "[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *United States v. Fabe*, 508 U.S. 491, 500 (1996). The Act should not be read "to 'turn back the clock' to a time prior to *South-Eastern Underwriters*." *Id.* at 506. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). "[I]t is impossible to compare our present world to the one that existed at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Id.* at 508.

The court of appeals in this case, apparently stymied by *Todd Shipyards*, has turned the clock back forty years to *Todd Shipyards* and to a world that existed forty years before that. This approach to the construction of the McCarran-Ferguson Act may tempt other courts to "turn back the clock" and also bolsters a theory of statutory construction that looks to policy intimations in legislative history rather than the plain language of statutes to determine their meaning. "Obviously Congress' purpose was

broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). The circumstances surrounding the enactment of the McCarran-Ferguson Act show that Congress intended to protect state insurance laws from *inadvertent* federal intrusion. *Barnett Bank v. Nelson*, 517 U.S. 25, 39-41 (1996) (emphasis original). It would be a great irony if Congress' Act "to restore the supremacy of the States in the realm of insurance regulation" *inadvertently* limited State authority through the same Act's legislative history. *Id.* at 40 (quoting *Fabe*, 508 U.S. at 500). The plain meaning of the language of the Act shows Congress' intent, and that plainly expressed intent should prevail in this case as it does elsewhere.

One oddity in *Todd Shipyards*, and a chief difficulty for State courts dealing with the case since its decision, is its reference to the legislative history of the McCarran-Ferguson Act and three of this Court's Due Process decisions. *Todd Shipyards*, 370 U.S. 453 (citing *Allgeyer v. Lousiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); and *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938) (collectively the Trilogy); H.R. Rep. No. 79-143 at 3 (1945); 15 U.S.C. §§1011-1015.

This Court generally has not been eager to overlook the plain language of a statute and defer to its legislative history in order to determine the meaning and intent of the statute. *See W. Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-101 (1991). *See also Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1310-11 (2001) (following the plain language of the Federal Arbitration Act despite contrary historical and policy arguments.) The McCarran-Ferguson Act says plainly "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the

regulation or taxation of such business by the several States." 15 U.S.C. §1011. "The business of insurance...shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. §1012(a).

The *Todd Shipyards* Court, however, read the reference to the Trilogy in McCarran-Ferguson's legislative history as Congress' "indicat[ion] without ambiguity . that such state 'regulation or taxation' should be kept within the limits set by the *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut Gen. Life Ins.* decisions." *Todd Shipyards*, 370 U.S. at 456. "Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned." *Id.* at 458. *Todd Shipyards* did not honor Congress' intent by overlooking "the bare bones of the McCarran-Ferguson Act" and deferring instead to its legislative history. 370 U.S. at 453. Worse, the Court also misjudged the significance and meaning of that history.

The legislative history of the McCarran-Ferguson Act merely states the truism that "the continued regulation and taxation of insurance by the States [shall be] subject always...to the limitations set out in the controlling decisions of the United States Supreme Court as, *for instance*, ...[the Trilogy]." H.R. Rep. No. 79-143 at 3 (1945) (emphasis added). The McCarran-Ferguson Act "was so designed as not to displace those three decisions." 370 U.S. at 455. But the legislative history does not indicate, conversely, that Congress intended to enshrine them. Congress intended only to displace certain effects of this Court's decision in *South-Eastern Underwriters*. *See South-Eastern Underwriters*, 322 U.S. at 552-53 (holding that the business of insurance is subject to Congress' authority under the Commerce Clause). *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985) (the Act was Congress' response only to *South-Eastern Underwriters*).

"[W]e give to the States no more powers than those they previously had, *and we take none from them*." *See Todd Shipyards*, 370 U.S. at 456 (quoting Sen. McCarran, 91 CONG. REC. at 1442) (emphasis added). States were simply given back their pre-*South-Eastern Underwriters* authority without additions or restrictions. 91 CONG. REC. 481, 483 (1945) (statements of Sen. Ferguson). Congress based the McCarran-Ferguson Act on draft legislation provided by the NAIC and acted promptly to cure the "absolute chaos exist[ing] in the insurance world." *Id.* at 483-84 (statements of Sens. O'Mahoney and Ferguson). Congress, with the support of the NAIC, did not intend State authority over the business of insurance to be forever defined by the authority that existed in 1945. *See also State Oil Co. v. Kahn*, 522 U.S. 3, 20-21 (1997) (Sherman Act invoked the common law itself, not merely the static content of the law as it existed in 1890).

By characterizing *Todd Shipyards* as a case construing the McCarran-Ferguson Act, the court of appeals reintroduces the same "turn back the clock" approach that this Court rejected in *Fabe*. It also presumes, ironically, that Congress intended, in a House Committee Report, to restrict the States by referring to a few Due Process decisions of this Court, while, in the plain language of the Act, Congress intended to liberate and restore them to the full authority they previously had. *Cf. Western & Southern*, 451 U.S. at 655 n.6 (rejecting the argument that the Act altered standards other than those derived from the Commerce Clause). The McCarran-Ferguson Act should be read to leave the States free to exercise their authority over the business of insurance, subject only to the constitutional standards of this Court and to the legislation of Congress on the subject of insurance. Instead, if *Todd Shipyards* means what the court of appeals said it does, the States are shackled to the past by a gossamer chain forged from a strand of legislative history.

III. *Todd Shipyards* has created conflict and confusion among the State courts seeking to apply it, and it ought to be explicitly overruled.

State courts are in conflict over the validity and meaning of *Todd Shipyards*, and only this Court can resolve it. *Compare Dow Chem.*, 38 S.W.3d at 745 *with Associated Elec. & Gas Ins. Serv. v. Clark*, 676 A.2d 1357, 1361 (R.I. 1996). The court of appeals in this case determined that *Todd Shipyards* "held that Texas' independently procured insurance tax violated McCarran-Ferguson." *Dow Chem.*, 38 S.W.3d at 745. The Rhode Island Supreme Court has stated plainly that "the holding in *Todd Shipyards Corp.* has been superseded not only by the state cases that purported to distinguish it but more significantly by the clear holding in *Quill*. We no longer exalt form over substance." *Associated Elec.*, 676 A.2d at 1361. *See also Lakehead Pipe Line Co., Inc. v. Amer. Home Assurance Co.*, 981 F. Supp. 1205, 1214-15 (D. Minn. 1997) (citing *Todd Shipyards* but declining to hold that a bond requirement violated Due Process for an insurer whose only contact with the State was the insured property).

State courts have not even been able to agree whether *Todd Shipyards* is a case based on Due Process, motivated by *stare decisis*, or a case construing the McCarran-Ferguson Act. *Compare, e.g., Associated Elec.*, 676 A.2d at 1361; *Howell v. Rosecliff Realty Co.*, 245 A.2d 318, 324 (N.J. 1968) (*Todd Shipyards* did no more than place the precise holdings of those cases beyond reconsideration); *Ministers Life & Cas. Union v. Haase*, 141 N.W.2d 287, 291-92 (Wis. 1966) (*Todd Shipyards* defined outer limits of due process but did not freeze state regulation to the type then extant) *appeal dismissed for want of a substantial federal question*, 385 U.S. 205 (1967); *and Gage & Tucker v. Dir. of Revenue*, 769 S.W.2d 119, 126 (Mo. 1989) (tax did not violate due process); *with Dow Chem.*, 38 S.W. 3d at 745; *People v. United Nat'l Life Ins. Co.*, 427 P.2d 199, 203 (Cal.)

(state regulations should be examined in the light of due process criteria existing prior to the enactment of the McCarran Act) *appeal dismissed for want of a substantial federal question*, 389 U.S. 330 (1967) *In re Markel Ins. Cos.*, 724 A.2d 848, 856 (N.J. Super. 1999) (*Todd Shipyards* ruled that Congress did not intend for states to have power to tax insurance transactions whose significant incidents occur wholly outside the state); *and Armed Forces Coop. Ins. Assoc. v. Dep't of Ins.*, 622 P.2d 1318, 1338-44 (Wyo. 1980) (Congress intended to impose limits of the Trilogy).

Some of these courts described the obvious interests and connections that States have regarding the insurance covering risks in those States. Insurance is an essential part of a State's primary responsibility. "[T]he State's power should not depend upon where the parties choose to contract for the insurance or to pay the loss." *Rosecliff Realty*, 245 A.2d at 324. The New Jersey court also recognized that parties to the insurance transaction are "aided by the measures the State takes to limit the incidence of losses covered by insurance." *Id.* Despite the limitations imposed by *Todd Shipyards*, the court opined that "there should be no need to find additional contacts or activities within a State to enable the State to act." *Id.*

The Wyoming Supreme Court has expressed similar views. "We think that a tax imposed by Wyoming on gross Wyoming premium receipts is constitutionally fair. The Wyoming insurance premiums bear a special and obvious relationship to Wyoming." *Armed Forces Coop.*, 622 P.2d at 1347. The court also noted the obvious relationship between the benefits and services provided in the State and the real economic interests represented by the insurance. "The cost of the insurance...will naturally depend on the occurrence or non-occurrence of disasters or mishaps in Wyoming. The frequency of such disasters or mishaps will, in part, be determined by the efforts of Wyoming in preventing them." *Id.* The court concluded that the real economic

consequence of the insurance in Wyoming "will depend on the protections Wyoming affords to [the] Wyoming insureds." *Id.*

Under *Todd Shipyards*, and if the taxpayer's domicile is the controlling factor in allocating the taxable intangible value of insurance, a Texas corporation, no matter how small, presumably may be liable for taxes on its procurement of insurance outside of the State under the circumstances of this case. A foreign corporation authorized to do business in a State, no matter how substantial its operations and insurance coverages, would be exempt from payment of tax on its purchases of independently procured insurance under the same circumstances. But if some correspondence or money is exchanged within the State, then the tax may be applied. *See, e.g., Ministers Life*, 141 N.W. 2d at 354; *People v. United Nat'l*, 427 P.2d at 207. An agent or adjuster investigating a claim in the State may justify the tax. *Rosecliff Realty Co.*, 245 A.2d at 327.

One could reasonably expect that Dow Chemical's insurers would send agents or adjusters to Texas if Texas were again struck by a major hurricane. The State's authority to collect tax on the localized value of an intangible asset owned by a corporation doing business in the State should not depend on a devastating and capricious windfall. If Dow Chemical negotiated its insurance from Freeport, Texas, rather than Midland, Michigan, would the practical economic connection between Texas and the value of the insurance be any different or any greater? If insurance negotiations and contract activities occur in more than one jurisdiction, what standards may be used to allocate or apportion the taxable value of the insurance? The *Todd Shipyards* rule makes no constitutional or practical economic sense.

Whether viewed as a decision on Due Process or one construing the McCarran-Ferguson Act, *Todd Shipyards* is in conflict with the Court's more recent jurisprudence. Unless this

Court resolves the conflicting and confusing doctrine of *Todd Shipyards*, States will not even know whether they should apply to Congress or await further action by this Court to overcome the anomalous and arbitrary results of this case. One State that in the past had not imposed insurance tax according to the location of the risk has recently amended its laws to do so. *See City of Charleston v. GEICO*, 512 S.E.2d 504, 506 (S.C. 1999). Should States now revert to a place of contract or domicile theory for taxing insurance? Should the NAIC's Model Act on nonadmitted insurance specify that corporations doing business in a State are outside the definition of "[e]ach insured in this state" for purposes of the independently procured insurance provision? *See* NAIC Model Act V-870-1 §6.

If *Todd Shipyards* is a case founded on Due Process, then it perpetuates outdated, formalistic concepts of Due Process, such as the place of contract, that say nothing about the fair taxation of the real economic value of insurance. Overruling *Todd Shipyards* will end that formalism and make insurance taxes, like all others, depend on Due Process nexus over the taxpayer and on taxation of values rationally connected to the taxing State.

If *Todd Shipyards* is a case construing the McCarran-Ferguson Act, then it inadvertently intrudes on the authority of States over the existing and future taxation of insurance that Congress specifically intended to protect. Overruling *Todd Shipyards* will end that intrusion. It will assure and effectuate Congress' intent to make State authority over the business of insurance, now and in the future, subject to Congress' express legislation on insurance and "to the controlling decisions of the United States Supreme Court." H.R. Rep. No. 79-143 (1945).

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

Carole Keeton Rylander, Comptroller of
Public Accounts of the State of Texas, and
John Cornyn, Attorney General of the State of Texas,
Petitioners,

v.

The Dow Chemical Company,
Respondent.

On Petition for Writ of Certiorari to
the Third Court of Appeals of Texas

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

A. Opinions A-1

B. Excerpts from State's Motion for Summary Judgment B-1

C. Excerpts from Dow Chemical's Motion for Summary Judgment C-1

APPENDIX A

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JANUARY 25, 2001

NO. 03-00-00354-CV

Dow Chemical Company, Appellant

v.

Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas; and John Cornyn, Attorney General of the State of Texas, Appellees

APPEAL FROM 250TH DISTRICT COURT OF TRAVIS COUNTY BEFORE JUSTICES KIDD, YEAKEL AND JONES; JUSTICE JONES NOT PARTICIPATING REVERSED AND RENDERED -- OPINION BY JUSTICE YEAKEL

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's summary judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the trial court is reversed, and judgment is rendered granting Dow Chemical Company's motion for summary judgment. **It is FURTHER** ordered that the appellees pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-0040354CV

Dow Chemical Company, Appellant

v.

Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas; and John Cornyn, Attorney General of the State of Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT, No-9905725, HONORABLE MARY PEARL WILLIAMS, JUDGE PRESIDING

Appellant Dow Chemical Company ("Dow") appeals from the district court's summary judgment in favor of appellees, Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas, denying Dow a refund of taxes previously paid.[1] Dow also appeals the district court's denial of its own motion for summary judgment. We will reverse the district court's summary judgment and render judgment granting Dow's motion for summary judgment.

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[1] The interests of the comptroller and the attorney general do not diverge. We will therefore refer to them jointly as the "Comptroller."

FACTUAL AND PROCEDURAL BACKGROUND

Dow is a Delaware corporation headquartered in Michigan and authorized to do business in Texas. *See* Tex. Bus. Corp. Act Ann. art. 8.05 (West Supp. 2001). Dow owns real and personal property in Texas. Although the property is located in Texas, Dow insures it through out-of-state insurance companies. These insurance companies are not authorized to sell insurance in Texas. Texas terms such insurance -- covering Texas risks but purchased from out-of-state insurance companies--"independently procured insurance" and imposes a tax on it. *See* Tex. Ins. Code Ann. §§101.252, .053(b)(4) (West Supp. 2001). Dow is required to file reports with and pay the tax to the Comptroller. *See id.* §101.252(a).

The Comptroller audited Dow for the period January 1, 1991 through December 31, 1997. *See* Tex. Tax Code Ann. §111.004 (West 1992). As a result of the audit, the Comptroller assessed Dow $427,148.80 for independently procured insurance taxes, penalties, and interest. *See* Tex. Ins. Code Ann. §101.252. Dow paid the assessment under protest and filed this suit in district court seeking a refund of its payment. *See* Tex. Tax Code Ann. §112.151 (West Supp. 2001); Tex. Gov't Code Ann. §§403.201-.204 (West 1998). The parties submitted competing motions for summary judgment. The district court granted summary judgment in favor of the Comptroller and denied Dow's motion. By one issue, Dow appeals, asserting that the district court erred in granting the Comptroller's motion and denying its motion for summary judgment.

DISCUSSION

Dow Chemical's Failure to Provide Notice

The insurance code requires that an insurer or other person

who claims an exemption based on the United States Constitution must file notice of the claim with the commissioner of insurance before commencing operations. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 918, §3, 1985 Tex. Gen. Laws 3088, 3090 (Tex. Ins. Code Ann. art. 1.14-1, §14, since repealed and codified at Tex. Ins. Code Ann. §101.004 (West Supp. 2001)).[2] Initially, the Comptroller urges, but does not assert as error, that the notice provision applies to Dow because of the "State's substantial interest in regulating insurance." The Comptroller "raise[s] this issue only as a defensive matter" and argues that this Court "should consider remanding the case if it finds this issue controlling." We do not.

The goal of statutory construction is to give effect to the intent of the legislature. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). If language in a statute is unambiguous, a court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Id.*

Section 101.004(a) of the insurance code states that Texas's independently procured insurance tax does not "apply to an insurer or other person to whom, under the constitution or statutes of the United States or the constitution of this state, it may not apply." Tex. Ins. Code Ann. §101.004(a) (West Supp. 2001). Section 101.004(b) continues, "Before commencing operations, an insurer or other person claiming an exemption described by Subsection (a) must file with the commissioner: (1) notice of the claim; and (2) documents supporting the claim." *Id.* §101.004(b). Although she states that the phrase "before commencing operations" is "admittedly obscure," the Comptroller urges us to hold that it is "broad enough to cover Dow's operations." However, the

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[2] Although the original statute has been repealed and codified, the changes are not substantive, and we will cite to the current code for convenience.

language of this section demonstrates that it is not meant to apply in the manner the Comptroller suggests. A close look at the policy and purpose behind the statute illustrates this point. The portion of the insurance code to which this section now refers is chapter 101, entitled "Unauthorized Insurance." *Id.* §101.001. Its policy and purpose section states, "It is a state concern that many residents of this state hold insurance policies issued by persons or insurers who are not authorized to do insurance business in this state .... These residents face often insurmountable obstacles in asserting legal rights under the policies in foreign forums under unfamiliar laws and rules of practice." *Id.* §101.001(a). The section continues that "it is the policy of this state to protect residents against acts by a person or insurer who is not authorized to do business in this state." *Id.* §101.001(b). Dow is not an insurer, nor has it engaged in unauthorized insurance business.

In addition, the notice requirement on which the Comptroller relies was enacted in 1985. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 918, §3, 1985 Tex. Gen. Laws 3088, 3090 (Tex. Ins. Code Ann. art. 1.14-1, §14, since amended). Using the application the Comptroller urges, Dow would have been required to provide notice before the notice provision was ever enacted if Dow commenced operations prior to 1985. Such a result does not follow logic. Construction of the plain language of statutes must avoid absurd results if the language will allow. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999). We hold that the notice requirements of the insurance code do not apply to Dow.

Texas's Independently Procured Insurance Tax

The parties do not dispute the facts of this case and, in their motions, both assert a right to summary judgment as a matter of law. Because the propriety of summary judgment in this case is a question of law, we review the district court's decision *de novo*.

See McCarthy Bros. Co. v. Continental Lloyds Ins. Co., 7 S.W.3d 725, 728 (Tex. App.-Austin 1999, no pet.); *Rylander v. 3 Beall Bros. 3, Inc.*, 2 S.W.3d 562, 566 (Tex. App.--Austin 1999, pet. denied). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment proof presented by both sides and determine all questions presented. *Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). If we find error, we must render the judgment the trial court should have rendered. *Id.*

The validity of the tax before us has previously been presented to this Court, the Texas Supreme Court, and the United States Supreme Court. *See State Bd. of Ins. v. Todd Shipyards Corp.*, 340 S.W.2d 339 (Tex. Civ. App.--Austin 1960), *writ ref'd n.r.e.*, 343 S.W.2d 241 (Tex. 1961), *aff'd*, 370 U.S. 451 (1962). Ultimately, the United States Supreme Court held that Texas's independently procured insurance tax violated federal law, specifically the McCarran-Ferguson Act, 15 U.S.C.A. §§1011-15 (West 1997). *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620 (1962).

A. *Todd Shipyards*

Prior to Congress's passage of the McCarran-Ferguson Act, the Supreme Court held that the Due Process Clause dictated that states could not tax the business of insurance. *See Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed 673 (1938); *St. Louis Cotton Compress Co. v.* Arkansas, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922); *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897). The Supreme Court has summarized these three cases as follows:

> The *Allgeyer* case held that Louisiana by reason of the Due Process Clause of the Fourteenth Amendment could not make it a misdemeanor to effect insurance on Louisiana risks with an

> insurance company not licensed to do business in Louisiana, where the insured through use of the mails contracted in New York for the policy. The *St. Louis Cotton Compress* case held invalid under the Due Process Clause an Arkansas tax on the premiums paid for a policy on Arkansas risks, made with an out-of-state company having no office or agents in Arkansas. The *Connecticut General Life Insurance* case held invalid under the Due Process Clause a California tax on premiums paid in Connecticut by one insurance company to another for reinsurance of life insurance policies written in California on California residents, even though both insurance companies were authorized to do business in California.

Todd Shipyards, 370 U.S. at 453-54, 82 S.Ct. 1380.

After its decisions in *Connecticut General*, *St. Louis Cotton Compress*, and *Allgeyer*, the Supreme Court held that the modern business of insurance was "interstate commerce."[3] *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 545-51, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Interstate commerce implicates the Commerce Clause. *See id.* at 538-39, 64 S.Ct. 1162. The Commerce Clause provides Congress with the "positive power" to regulate such business. *Id.* at 552-53, 64 S.Ct. 1162. In *South-Eastern Underwriters*, the Court upheld

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[3] In several prior cases involving challenges to state regulation, the Court had held that the buying and selling of insurance was not commerce at all. *See New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332 (1913); *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297 (1895); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869).

congressional regulation of insurance. *See id.* at 562, 64 S.Ct. 1162. However, the Court did not hold that the states were necessarily prohibited from continuing to regulate insurance transactions and practices.[4] *See id.* at 534-62, 64 S.Ct. 1162.

Then in 1945, Congress passed the McCarran-Ferguson Act. The McCarran-Ferguson Act "provided that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause." *Todd Shipyards*, 370 U.S. at 452, 82 S.Ct. 1380; *see* McCarran-Ferguson Act §§1011-15. But the history of the McCarran-Ferguson Act also provides"an explicit, unequivocal statement that the Act was so designed as not to displace" *Connecticut General*, *St. Louis Cotton Compress*, and *Allgeyer*. *Todd Shipyards*, 370 U.S. at 455, 82 S.Ct. 1380. In *Todd Shipyards*, the Supreme Court held that Texas's independently procured insurance tax violated McCarran-Ferguson. Curiously, such a holding from the United States Supreme Court has not dissuaded the Comptroller from levying this tax. But *Todd Shipyards* controls our analysis today. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

B. The Texas Tax

Today's question is whether Dow is engaged in the same insurance activities as was Todd Shipyards. At the time of *Todd Shipyards*, the independently procured insurance tax statute was

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[4] At the time of *South-Eastern Underwriters*, the Supreme Court had upheld state regulation of insurance in a number of cases. *See Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943); *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940); *New York Life Ins.*, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332; *Hooper*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *Paul*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357.

codified in article 21.38 of the insurance code and provided the following:

> If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance.

Act of May 14, 1957, 55th Leg., R.S., ch. 395, §1, 1957 Tex. Gen. Laws 1180, 1181 (Tex. Ins. Code Ann. art 21.38, §2(e), since repealed and codified at Tex. Ins. Code Ann. §101.252 (West Supp. 2001)). In similar terms, the tax at issue in this case is applied as follows:

> Every insured who procures insurance in [transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid] must file a report with the comptroller and pay an independently procured insurance tax of 4.85 percent.

Act of May 27, 1993, 73d Leg., R.S., ch. 999, §7, 1993 Tex. Gen. Laws 4373, 4373 (Tex. Ins. Code Ann. art 1.14-1, §12(a), since repealed and codified at Tex. Ins. Code Ann. §101.252). The statutes are essentially the same, and, with the exception of the rate, they result in the same tax.

The factual similarities between Todd Shipyards and Dow are also readily apparent:

> In both instances the insurance in question covered property in Texas owned by a foreign corporation.
> All of the insurers are domiciled outside of this state.
> All of the insurance agreements made the basis of the tax were contracted for, signed, issued, delivered, paid for, and accepted out of this state.
> None of the insurers has a permit or license from Texas to write insurance in the state and none of the insurers are subject to examination or subject to any control by this state.
> None of the insurers has an office or agent in Texas.
> None of the insurers investigated or adjusted claims within Texas.
> None of the insurers ever solicited Todd Shipyards' or Dow's insurance business or policies within Texas.
> None of the insurers communicated with either Todd Shipyards or Dow within the state.
> All decisions relative to the purchase and renewal of insurance, extent and amount of coverage, the selection of insurers and confirmation of insurance contracts are made outside of Texas.
> Under the policies, all losses are payable out-of-state and all premiums are paid out-of-state.

Because the law and the facts at issue today are essentially the same, we hold that the insurance at issue in *Todd Shipyards* is virtually identical to the insurance at issue in this case.

Due Process

The Comptroller urges us to ignore *Todd Shipyards* and apply a due-process analysis to the permissibility of a tax on independently procured insurance. The Comptroller argues that more recent due-process decisions have rejected "the meaningless formalisms of another era" and superseded *Todd Shipyards*. The

Comptroller continues that "it would be unreasonable to expect the [Supreme] Court to undertake the daunting clerical task of identifying all the decisions" superseded by the Court's current line of due-process decisions and formally overrule them. However, a due-process analysis is unnecessary. We discern no difference between the tax at issue in *Todd Shipyards* and the tax challenged today. We must adhere to precedent in the face of a United States Supreme Court case directly on point. *See Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. In *Rodriguez de Quijas*, the Fifth Circuit Court of Appeals declined to follow a prior and controlling decision of the Supreme Court, stating that the decision had been reduced to "obsolescence" by subsequent decisions of the Court . *Id.* at 479, 109 S.Ct. 1917. In reviewing the court of appeals decision, the Supreme Court stated, "If a precedent of this Court has direct application to a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484, 109 S.Ct. 1917. State courts are no exception; this Court is bound by *Todd Shipyards* unless and until the Supreme Court overrules it. *See Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex.), *cert. denied*, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed. 3d 386 (1999).

CONCLUSION

We sustain Dow's issue on appeal, reverse the judgment of the district court, and render judgment for Dow granting it's motion for summary judgment.

Lee Yeakel, Justice

Before Justices Kidd, Yeakel and Jones;* Justice Jones not participating

Reversed and Rendered

Filed: January 25, 2001

Publish

* Before J. Woodfin Jones, Justice (former), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 75.003(a)(1) (West 1998).

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 7, 2001

Mr. William E. Storie
Office of the Attorney General of Texas
P. O. Box 12548
Austin, TX 78711-2548

Mr. Ray H. Langenberg
Scott Douglass & McConnico
600 Congress Avenue, Suite 1500
Austin, TX 78701-2589

RE: Case Number 01-0203
Court of Appeals Number: 03-00-00354-CV
Trial Court Number: 9905725

Style: CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS
v.
THE DOW CHEMICAL COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R.Hunter, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS COUNTY, TEXAS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	250TH JUDICIAL DISTRICT

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 6, 2000, the parties in the above captioned case appeared through their representatives and attorneys of record.

The Court, having heard the cross motions for summary judgment of Plaintiff Dow Chemical Company and Defendants Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas (Comptroller) and having considered the pleadings and the arguments and authorities presented by counsel, concludes that the
Comptroller's motion for summary judgment should be granted and that Dow Chemical Company's motion for summary judgment should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Comptroller's motion for summary judgment be granted and that Dow's motion for summary judgment be denied.

IT IS FURTHER ORDERED that the State retain the tax at issue and that costs of court be adjusted against Dow Chemical Company.

This is the final judgment. All relief not granted is denied.

Signed this 13th day of April, 2000.

/s/ Mary Pearl Williams
Honorable Mary Pearl William
Judge Presiding

APPROVED AS TO FORM:

/s/ Ray Langenberg
Ray Langenberg
SCOTT, DOUGLASS &McCONNICO, L.L.P.
Attorneys for Plaintiff

/s/ William E. Storie
William E. Storie
Assistant Attorney General
Attorney General of Texas
Attorneys for Defendants

APPENDIX B

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Carole Keeton Rylander, Comptroller of Public Accounts of the State of Texas, and John Cornyn, Attorney General of the State of Texas (Comptroller) respectfully move for Summary Judgment against Dow Chemical Company (Dow) and would show as follows:

Basis for the Motion

1. For purposes of this Motion, there are no genuine issues of material fact and the Comptroller is entitled to judgment as a matter of law.

2. This Motion is based on the pleadings, the discovery responses of Dow attached to this motion, and the affidavit of Gary Johnson with Exhibits. Dow's attached discovery responses

are: (1) Response to Request for Admissions, (2) Answers to Interrogatories, (3) Starr Excess Insurance policy, and (4) Timber Insurance policy. Gary Johnson's affidavit is at Tab 5.

Grounds for the Motion

3. The Comptroller is entitled to summary judgment because the summary judgment proof shows that Dow and the insurance transactions at issue have sufficient nexus with Texas to justify a proportionate tax based on premiums paid by Dow covering its risks in Texas. The undisputed proof shows that Dow has a substantial presence in Texas. See Response to Request for Admissions. It shows further that the percentage allocation of risk and premiums to Dow's Texas property on which the tax is based were accurately computed by the Comptroller. See Response to Request for Admissions. The allocation of premiums based on the location of the risk or property insured is consistent with the gross premium reporting requirements of the National Association of Insurance Commissioners. See affidavit of Gary Johnson. Thus, the premiums-based tax assessed against Dow in this case would not be subject to tax elsewhere because the premiums are Texas premiums.

The excess liability policies on which the tax was based cover Texas risks and, logically, would be available to pay the damages of Texas citizens making claims against Dow for the risks and amounts insured against. In addition, the insureds in the policies include Dow's Texas employees acting within the scope of their employment. Dow's discovery responses show that the negotiating process in which the various coverages are obtained considers the properties and business to be covered. See Answers to Interrogatories and Timber policy.

Specifically, the insurers retain the right to inspect Dow's property at any time. This would necessarily include Dow's

property in Texas. Further, the insurers reserve the right to appeal adverse decisions against Dow that would invoke protection of the policies in the event that Dow and its primary insurer decided not to appeal. Dow's insurers also claim the contractual right, but not the obligation, to participate in litigation strategy and to require the cooperation of the insureds in handling a claim. These legal and contractual connections with Texas are sufficient to meet the due process test set forth in *Todd Shipyards. State Bd. Of Ins. v. Todd Shipyards Corp.*, 370 U.S. 45 1 (1962).

The independently procured insurance tax at issue in this case is a part of the State's overall regulatory protection of Texas insurers against the unauthorized practice of insurance and a protection of Texas revenues from loss of premium taxes that independent procurement of insurance might otherwise create. *See* TEX. INS. CODE art. 1.14-1 § 1. The code also defines a number of acts which constitute the doing of an insurance business in Texas. *Id.* at § 2. The statute further provides that the unauthorized insurance laws do not apply to "Transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid in accordance with this Article." *Id.* at (b)4. Under current constitutional due process standards, the State of Texas has sufficient interest in these transactions to collect an insurance tax from Dow based on the premiums it pays to cover risks in Texas.

Even if Dow's insurance transactions do not have sufficient nexus with Texas to be taxable under the *Todd Shipyards* case, it is clear that *Todd Shipyards* itself has been superseded by later decisions of the United States Supreme Court. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1996). In particular, there can be no question that Dow itself has substantial nexus with Texas and, in fact, has substantial physical presence and substantial assets and property in Texas.

Courts in other jurisdictions have concluded that *Todd Shipyards* has been superseded by other decisions of the United States Supreme Court, even where action is taken against the insurer. *Associated Electric & Gas Ins. Serv. Ltd. v. Clark*, 676 A.2d 1357 (R. I. 1996). Where the action taken is an assessment of tax against the insured in respect of its economic value in Texas, it should be even more clear that *Todd Shipyards* has no continuing vitality. The Rhode Island Supreme Court pointed out that *Todd Shipyards* has been superseded by the *Quill* case, which recognized that physical presence was not necessary to permit the State to reach a transaction between a foreign insurer and a resident insured. *Id.* at 1360-1361. Here, hundreds of millions of dollars in excess insurance coverage are provided not just to protect the Texas property of the insured, Dow and its employees, but realistically to protect the many Texas citizens and property owners who might potentially make claims against Dow in the event of a disastrous occurrence such as those provided for in the excess insurance coverages.

The McCarran-Ferguson Act expressly states that silence on the part of Congress shall not be construed to affect the State's regulation of insurance. 15 U.S.C. §§ 1011, 1012(a). The Court in *Todd Shipyards* stated, as it must, that in passing the McCarran-Ferguson Act Congress was not attempting to limit the applicability of the Court's decisions on constitutional due process. *Todd Shipyards*, 370 U.S. at 457. Although the *Todd Shipyards* Court cited legislative history of McCarran-Ferguson and its reference to three older decisions of the United States Supreme Court, it is current jurisprudence under the constitution which ought to control the State's ability to tax Dow on its insurance transactions covering property in Texas.

In many respects, taxation of the insured for the amount of premiums it pays for independently procured insurance is significantly similar to imposition of the use tax on purchases of

goods and services. In taxing the consumer of the insurance, the State does not purport to regulate the transaction or bind the foreign insurer any more than it attempts to regulate an interstate sale of services and goods by imposing a use tax on the Texas consumer. Here Dow, a resident of Texas which owns substantial property in Texas covered by the insurance, is the user of the insurance contract purchased by it to provide excess insurance coverage for losses in Texas. Constitutionally, the connection is more than sufficient between the item taxed and the State of Texas and its interests to justify the tax imposed.

CAUSE NO. 99-05725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
VS.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit or deny that you did business in the state of Texas during the audit period.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2:

Admit or deny that during the audit period, you had real and personal property within the state of Texas.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 3:

Admit or deny that if the independently procured insurance tax were assessable against you in this case, then the amount of tax calculated by the Comptroller is correct.

RESPONSE: Admit

CAUSE NO. 99-05725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
VS.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF

INTERROGATORY NO. 5:

Please describe in detail the process by which the policy was negotiated and purchased by Dow Chemical and identify all persons who participated in that process.

ANSWER:

See "A," "B," and "C," below for descriptions and identification.

A. Renewal Process for Excess Liability utilizing the Bermuda Insurance Market:

(A) As a rule, Dow's Liability Insurance policies have been written on an annual basis since 1976. To this end, Corporate Risk Management (CRM) analyzes Dow's

Liability exposure based on many items including, but not limited to:

- Sales
- Manufacturing Locations
- Dow Claims Experience and Development
- Current Litigation activity worldwide (both specific to and not specific to Dow)
- Employee Count
- Products manufactured
- Aircraft count
- Watercraft count
- Vehicle type and count
- Current Corporate Financial status

2. Discussions with Marsh (our insurance broker out of Detroit, with an office in Bermuda) are conducted on current Risk Management tools available to Dow, including but not limited to:

    - Insurance Coverages & Exclusions
    - Insurance Companies Analysis- financial stability, claims handling, etc.
    - Deductibles and other conditions

3. Strategy is developed for:

    - Coverages
    - Amount of limits
    - Carriers' potential to be on the Dow program based on Insurance Companies Analysis

4. Receive and complete each insurance carrier's Application for Insurance. Insurance carriers may have their own Insurance Application, or may use a "Bermuda Application". The

questions generally pertain to company operations, some of the exposure items as listed in 1 above and company loss experience.

5. Send completed Insurance Application to Marsh. Marsh forwards Insurance Application on to the insurance carrier.

6. Receive and respond to any additional questions from the insurance carriers. (Questions and responses are always forwarded through Marsh).

7. Travel to Bermuda to meet with insurance carrier's management and underwriting team to discuss:

    - Dow's current business strategy
    - Insurance carrier's current business strategy
    - Explanation of program structure desired by Dow based on insurance products available
    - Insurance market conditions
    - Coverages and limits available
    - Pricing
    - Any additional issues raised by either Dow or insurance carrier

8. Receive quotations from each of the insurance carriers through Marsh.

9 Evaluate the quotations:

    - Coverage
    - Pricing
    - Insurance carrier analysis

10. Make a decision on program structure - negotiating with companies, through Marsh, on coverage and pricing to secure

insurance. Communicate this information to Marsh, requesting binders of insurance from selected carriers.

11. Make payments based on instructions on insurance binders. Payment made through Marsh.

12. Receive insurance policies from insurance carriers, through Marsh.

The persons who participated in the above process were:

Paul D. Brink (The Dow Chemical Co., Director of Corporate Risk Management Dept. (1993-present), Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-0554);

Howard Burdett (Director of Corporate Risk Management (1991-1993), c/o Aluminum Company of America, 425 Sixth Avenue, Pittsburgh, PA 15219; phone (412) 553-4545)

John C. Gorte, The Dow Chemical Co., Manager of Liability Programs (1991-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-3202)

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600 Evergreen; Midland, MI 48642; phone (517) 832-8966)

Linda S. Holder (The Dow Chemical Co., Assistant Manager of Liability Programs (1991-1994), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-4718)

Tracy T. Perry (The Dow Chemical Co., Assistant Manager of Liability Programs (1994-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone

(517) 636- 1109)

Robert D. Doyle Jr. (Marsh USA Inc., 600 Renaissance Center, Suite 2100 Detroit, MI 48243; phone (313) 393-6817)

Joy A. Stockmaster (Marsh USA Inc., 600 Renaissance Center, Suite 2100, Detroit, MI 48243; phone (313) 393-6760))

Kathryn Winter (Marsh Global Broking (Bermuda) Ltd., Craig Appin House, 8 Wesley Street, Hamilton HM JX, Bermuda; phone (441) 295-3454)

Richard N. Peters (c/o RNP Corporation, 1360 Woodbridge, St. Clair Shores, MI 48080; phone (810) 775-5067)

David Holmes, Vice President, Marsh Global Broking (Bermuda) Ltd., Craig Appin House, 8 Wesley Street, Hamilton HM JX, Bermuda; phone (441) 295-3454)

B. Dorintal and Timber Excess & Pollution:
Renewal Process for Excess Liability utilizing the Bermuda Insurance Market:

1. Dow's Liability Insurance policies with their insurance subsidiaries have been written on an annual basis since 1977. To this end, Corporate Risk Management (CRM) analyzes Dow's Liability exposure based on many items including, but not limited to:

- Sales
- Manufacturing Locations
- Dow Claims Experience and Development
- Chemical Industry Claims Experience and Development
- Current Litigation activity worldwide (both specific to

and not specific to Dow)

- Employee Count
- Products manufactured
- Aircraft count
- Watercraft count
- Vehicle type and count
- Current Corporate Financial status

2. CRM reviews available products from non-Dow commercial insurance carriers including but not limited to:

    - Insurance Coverages & Exclusions
    - Insurance Companies Analysis- financial stability, claims handling, etc.
    - Deductibles and other conditions

3. Strategy is developed for desired insurance coverages and limits. CRM analyzes the products available from non-Dow commercial insurance carriers, compares these to the desired insurance coverage and determines areas for negotiating coverage with Dorintal and Timber.

4. Provide Dorintal or Timber with exposure information as requested. Much of this information is similar to what is listed in item 1.

5. Receive and respond to any additional questions from Dorintal or Timber.

6. Meet with Dorintal or Timber in Midland, Michigan, with insurance underwriting team to discuss:

    - Dow's current business strategy
    - Timber or Dorintal current business strategy
    - Explanation of program structure desired by DOW

based on insurance products available

- Insurance market conditions
- Coverages and limits available
- Pricing
- Any additional issues raised by either Dow or Timber/Dorintal

7. Receive quotations

8. Evaluate the quotations:

    - Coverage
    - Pricing

9 Make a decision on program structure - negotiating with Timber or Dorintal on coverage and pricing to secure insurance.

10. Make payments based on instructions on insurance binders.

The persons who participated in the above process were:

Paul D. Brink (The Dow Chemical Co., Director of Corporate Risk Management Dept. (1993-present), Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-0554)

Howard Burdett (Director of Corporate Risk Management (1991-1993), c/o Aluminum Company of America, 425 Sixth Avenue, Pittsburgh, PA 15219; phone (412) 553-4545)

John C. Gorte, The Dow Chemical Co., Manager of Liability Programs (1991-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-3202)

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600

Evergreen; Midland, MI 48642; phone (517) 832-8966)

Linda S. Holder (The Dow Chemical Co., Assistant Manager of Liability Programs (1991-1994), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-4718)

Tracy T. Perry (The Dow Chemical Co., Assistant Manager of Liability Programs (1994-present), Corporate Risk Management Dept., Suite 300, 1320 Waldo Avenue, Midland, MI 48642; phone (517) 636-1109)

C. Dow Property Insurance Procurement - Dow and Timber

In 1993-94 and 1994-95 Timber wrote property policies directly with The Dow Chemical Company for coverage of portions of the Global Property Insurance Program.

The process for procurement of this insurance was as follows:

1. Dow's Corporate Risk Management Department (CRM) along with the Property Insurance broker (Sedgwick, located in Boston, MA) would analyze the various property risk exposures. These exposures would include:

    11. List of asset locations.
    12. Property insurable values.
    13. Inventory insurable values.
    14. Business Interruption insurable values.
    15. Property Loss statistics.
    16. Maximum Loss evaluation studies. (PML -Probable Maximum Loss studies)

2. CRM along with the broker evaluates the available insurance market for products. This includes the Dow and non-Dow

insurance markets. Some of the information evaluated includes:

17. Insurance limits and coverages

18. Insurance company security

3. CRM along with the broker develops an overall strategy as to the design of the Global Property Insurance Program.

4. Information packages are developed by Dow and the broker (Property Insurance submissions). This information would include the type of exposure information listed in number 1 above as well as additional information if desired or requested. This information is sent to the Dow and non-Dow insurance markets.

5. Receive and respond to any additional questions from the Dow or non-Dow insurance markets.

6. Meet with Timber in Midland, Michigan, with the insurance underwriting team to discuss:

   - Dow's current business strategy
   - Timber's current business strategy
   - Review and explanation of the submission package including the proposed Global Property Insurance Program structure.
   - Insurance market conditions
   - Coverages and limits
   - Pricing

7. Receive quotations

8. Evaluate quotations based on

- Terms
- Pricing

9. Negotiate coverage and pricing with Timber.

10. Bind coverage.

11. Make premium payments based on insurance binder terms.

The persons who participated in the above process were:

Gerald A. Heinz (Manager of Insurance (1991-1998); 5600 Evergreen; Midland, MI 48642; phone (517) 832-8966))

Harrison Plum, Jr. (Manager of Property Programs (1991-1997), Corporate Risk Management Dept., 704 Wilson Drive, Midland, MI 48642; phone (517) 835-8044)

Al Blankenship (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

Thomas Stewart (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

Diane Gould (c/o Marsh, Inc., Global Services, Sedgwick Global Property Dept., 200 Clarendon Street, Boston, MA 02116; phone (617) 421-0286)

STARR EXCESS
Liability Insurance Company, Ltd.
29 Richmond Road, Pembroke HM08, Hamilton, Bermuda

DECLARATIONS-attaching to and forming part of Policy No. 200806

Item 1	(a) **Named Insured:**	The Dow Chemical Company
	(b) Address:	2030 Dow Center Midland, Michigan 48674, USA
Item 2	**Limits of Liability:**	
	(a) Per **Occurrence**	$100,000,000
	(b) Annual **Aggregate**	$100,000,000
Item 3	**Retention:**	
	Per **Occurrence**	$250,000,000
Item 4	**Inception Date:**	February 28, 1995
	at 12:01 A.M. at the address of the Named Insured listed in Item 1(b) above.	
Item 5	**Retroactive Coverage Date**:	December 1, 1993
Item 6	**Representative of Named Insured:**	~~Bowring (Bermuda) Ltd~~
Item 7	**Currency:**	
	(a) Premium:	US$
	(b) Claims:	US$
Item 8	**Premium:**	$453,600

STARR EXCESS
Liability Insurance Company, Ltd.

Item 9 **The Company:**

(a) All Notices of Occurrence or Claim: Claims Dept.

(b) All other Notices: Underwriting Department, President, Starr Excess

Item 10 **Application Date**: November 17, 1994 with Schedules A and C. September 25, 1995, Schedule B.

Item 11 **Policy Form:** SELIC IO-01 amended to provide No Batch Coverage.

Endorsements: 1-7

/s/ Jarol W. Mitchell (?)
Authorized Representative

Date of Issuance - November 6, 1995

STARR EXCESS
Liability Insurance Company, Ltd.

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NOTICE: **THIS TABLE OF CONTENTS IS FOR REFERENCE PURPOSES ONLY. IT IS NOT PART OF THE TERMS, CONDITIONS OR EXCLUSIONS OF THIS POLICY, AND IS NOT INTENDED TO AFFECT THE MEANING OF SUCH TERMS, CONDITIONS OR EXCLUSIONS.**

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THIS IS A STAND-ALONE LIABILITY POLICY WHICH IS NOT SUBJECT TO THE TERMS AND CONDITIONS OF ANY OTHER INSURANCE AND CONTAINS PROVISIONS WHICH AY BE DIFFERENT FROM THOSE OF ANY OTHER INSURANCE. IT SHOULD BE READ CAREFULLY BY THE INSURED

COVERAGE APPLIES, SUBJECT TO THE TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY. ONLY IF NOTICE OF OCCURRENCE OR OF A CLAIM ARISING THEREFROM IS GIVEN DURING THE POLICY PERIOD OR IF PURCHASED, THE DISCOVERY PERIOD. THE DATE SUCH NOTICE IS GIVEN IS THE DATE FOR DETERMINATION OF THE APPLICABLE LIMITS, RETENTIONS, TERMS, CONDITIONS AND EXCLUSIONS OF THE POLICY.

THE COMPANY DOES NOT HAVE ANY DUTY TO DEFEND, DEFENSE COSTS COVERED BY THE POLICY ARE INCLUDED WITHIN AND ARE NOT IN ADDITION TO THE LIMITS OF LIABILITY OF THIS POLICY.

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In consideration of the payment of the premium set forth in Item 8 of the Declarations and in reliance upon the statements in the Application and Schedules referred to in Item 10 of the Declarations and any Renewal applications(s) and any supplementary information pertaining to any such application, which are hereby incorporated by reference as if physically attached to this Policy, the Company agrees as follows:

INSURING AGREEMENTS

I COVERAGE

To indemnify **the Insured** for **Ultimate Net Loss** the **Insured** becomes obligated to pay by reason of liability:

(a) imposed by law, or
(b) assumed by **the Insured** under contract or agreement prior to the commencement of the **Occurrence** giving rise to such liability,

for **Damages** on account of:

(i) **Personal Injury**
(ii) **Property Damage**
(iii) **Advertising Liability**

caused by an **Occurrence**; provided,

COVERAGE A: Notice of the **Occurrence**, or of a **Claim** arising therefrom, shall have been given by **the Insured** during the **Policy Period** in accordance with Section V of this Policy, or

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COVERAGE B: Notice of the **Occurrence**, or of a **Claim** arising therefrom shall have been given during the **Discovery Period** in accordance with Section V of this Policy, but only if the **Discovery Period** option has been elected in accordance with the provisions of this Policy.

II LIMITS OF LIABILITY

A. Regardless of the number of **Insureds** under this Policy, the Company shall be liable only for that amount of **Ultimate Net Loss** for each **Occurrence** covered under this Policy, other than an **Industrial Aid Aircraft Occurrence**, which is in excess of the greater of:

(1) The amounts indicated as the limits of the underlying insurances listed on the present or any prior Schedule B annexed to this Policy and any other underlying insurance, irrespective of whether the limits of such underlying insurances are available or collectible; or

(2) The per **Occurrence** Retention amount listed in Item 3 of the Declarations,

and then only up to per **Occurrence** limit of liability stated in Item 2(a) of the Declarations for each **Occurrence** covered hereunder, and further subject to the aggregate limits of liability stated in Item 2(b) of the Declarations for all **Occurrences** covered in each **Annual Period**.

B. Subject to Exclusions P and Q, all **Personal Injury** or **Property Damage** arising from an **Integrated Occurrence** shall be added together and treated as one **Occurrence**, irrespective of

the number of persons injured or properties damaged.

The applicable underlying limits, retention, limits of liability and terms and conditions of the policy applicable to such **Personal Injury** or **Property Damage** shall be determined under the policy in effect on the date the Company receives **Notice of Integrated Occurrence**.

Subject to Exclusion Q, if notice of an **Occurrence** has been given during a prior **Annual Period**, and such **Occurrence** is included in the **Notice of Integrated Occurrence** given during a subsequent **Annual Period**, all **Ultimate Net Loss** arising from such **Occurrence** shall be included in the **Ultimate Net Loss** arising from the **Integrated Occurrence**. Any payments of **Ultimate Net Loss** on account of such earlier notified **Occurrence** shall be deemed to have been made under the **Annual Period** in which the **Company** received **Notice of Integrated Occurrence**. Appropriate adjustments shall be made to the applicable limits of liability in the respective **Annual Periods** of this Policy to reflect such transfer of **Ultimate Net Loss** payments from the prior **Annual Period** to the **Annual Period** in which **Notice of Integrated Occurrence** was given.

C. Subject to the limits of liability stated in Item (2)(a) and (b) of the Declarations, and regardless of the number of **Insureds** under this Policy, the **Company** shall be liable only for that amount of **Ultimate Net Loss** for each **Occurrence** arising out of **Industrial Aid Aircraft Use** which is in excess of the greater of:

(1) The per **Occurrence** Retention amount stated in Item 3 of the Declarations; or
(2) One Hundred Million Dollars ($100,000,000.00).

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D. The limits of liability of any underlying insurances, the retention stated in Item 3 of the Declarations, and the amount stated in Paragraph C of this Section II shall be reduced or exhausted solely by the actual payment of **Claims** covered under this Policy. This Policy shall not be subject to or follow the form of any underlying insurances, but shall apply in accordance with its own terms, conditions and exclusions.

E. (1) With respect to any liability of an **Insured** which arises in any manner whatsoever out of operations or the existence of any **Joint Venture** in which such **Insured** has an interest, the liability of the **Company** under this Policy shall be limited to **the Insured's** liability arising out of such **Joint Venture**.

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(ii) Infringement of registered trademarks, service marks or trade name by use thereof, but this exclusion shall not apply to titles or slogans;

(iii) The failure of goods, products or services to conform with advertised quality or performance;

(iv) The wrong description of the price of goods, products or services;

(v) An offense committed by an **Insured** whose business is advertising, broadcasting, publishing or telecasting.

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IV CONDITIONS

A. PREMIUM

The premium for this Policy is a flat premium and is not subject to adjustment. The premium shall be paid to the **Company**.

B. INSPECTION

The **Company** shall be permitted but not obligated to inspect **the Insured's** property and operations at any time. Neither the **Company's** right to make inspections nor the making thereof or of a report thereon shall constitute an undertaking on behalf of or for the benefit of **the Insured** or others to determine or warrant that such property or operations are safe or are in compliance with any statute, law, ordinance, rule or regulation.

C. CROSS LIABILITY

In the event of a **Claim** made by reason of **Personal Injury** sustained by an employee of one **Insured** hereunder for which another **Insured** hereunder is or may be liable, this Policy shall cover such Insured against whom **a Claim** is made in the same manner as if separate **policies** had been issued to each **Insured** hereunder.

Except with respect to Exclusion D, in the event of any **Claims** made by **reason** of **Property Damage** to the property of one **Insured** hereunder for which another **Insured** hereunder is liable, this Policy shall cover such **Insured** against whom **a Claim** is made in the same manner as if separate policies had been issued

to each **Insured** hereunder.

Nothing contained herein shall operate to increase the **Company's** limits of liability **as set** forth in Item 2 of the Declarations.

D. ASSISTANCE AND COOPERATION

(1) The **Company** shall not be called upon to assume charge of the settlement or defense of any **Claim** made or suit brought or proceeding instituted against an **Insured**, but the **Company** shall have the right and shall be given the opportunity to associate with the **Insured** or the **Insured's** underlying insurers or both in the defense and control of any **Claim**, suit or proceeding relative to any occurrence where the **Claim** or suit involves, or appears reasonably likely to involve, the **Company**, in which event **the Insured** and the **Company** shall cooperate in all things in the defense of such **Claim**, suit or proceeding.

(2) **The Insured** shall furnish promptly all information reasonably requested by the **Company** with respect to any **Occurrence**, both with respect to any **Claim**, suit or proceeding against the **Insured** and pertaining to coverage under this Policy.

(3) Those expenses incurred by the **Company** on its own behalf in connection with claims representation pursuant to this Condition D (1) shall be at its own expense and shall not be part of **Ultimate Net Loss**.

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E. APPEALS

In the event **the Insured** or **the Insured's** underlying insurers elect not to appeal a judgment in excess of the retention or the underlying limits, as the case may be, the **Company** may elect to make such appeal at its own cost and expense and shall be liable for the taxable costs and disbursements of such appeal and post-judgment interest on the judgment appealed from accruing during such an appeal. In no event, however, shall liability of the **Company** for **Ultimate Net Loss** exceed the applicable limit of liability set forth in Item 2 of the Declarations plus the costs and expenses of such appeal.

F. LOSS PAYABLE

Liability under this Policy with respect to any **Occurrence** shall not attach unless and until:

(1) **the Insured's** underlying insurer(s) or **the Insured** shall have paid the greater of the amount of any underlying limits or the applicable retention set forth in Item 3 of the Declarations; and

(2) **the Insured's** liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by settlement approved in writing by the **Company**.

The Insured shall make a definite demand for payment for any amount of the **Ultimate Net Loss** for which the **Company** may be liable under this Policy within twelve (12) months after **the Insured** shall have paid such amount. If any

subsequent payments shall be made by **the Insured** on account of the same **Occurrence** or **Claim**, additional demands for payment shall be made similarly from time to time. Such losses shall be due and payable by the **Company** within thirty (30) days after they are respectively demanded and proven in conformity with this Policy. If judgment is rendered, settlement is denominated or another element of **Damages** is stated in a currency other than the applicable currency under Condition L below, payment under this Policy shall be made in

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defenses under this Policy and any other defenses, other than jurisdiction defenses, as it would have been entitled to raise in the action or proceeding with such insurers.

N. CONSENT TO JURISDICTION

Solely for the purpose of effectuating the foregoing arbitration provision, including the enforcement of any award entered in such arbitration, the **Company** agrees as follows:

(1) the **Company**, at the request of **the Insured**, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of the **Company's** rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a

transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon the party named in Item 9(b) of the Declarations and that in any suit instituted against it upon this Policy, the **Company** will abide by the final decision of such Court or of any Appellate Court in the event of an appeal;

(2) The party named in Item 9(b) of the Declarations is authorized and directed to accept service of process on behalf of the **Company** in any such suit and/or upon the request of the **Insured** to give a written undertaking to the **Insured** that such party will enter a general appearance upon the **Company's** behalf in the event such a suit shall be instituted.

(3) Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, the **Company** hereby designates the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of **the Insured** or any beneficiary hereunder arising out of this Policy, and hereby designates the party named in Item 9(b) of the Declarations as the person to whom the said officer is authorized to mail such process or a true copy thereof;

(4) Other than as set forth in this Condition N, the party in Item 9(b) of the Declarations shall have no authority to act for or bind the **Company**.

O. GOVERNING LAW AND INTERPRETATION

(1) This Policy shall be governed by and construed in accordance with the substantive laws of the State of New York, except insofar as such laws:

(a) may prohibit payment in respect of punitive damages covered hereunder;

(b) pertain to regulation by the Insurance Department of the State of New York of insurers doing insurance business or of issuance or delivery of policies of insurance within the State of New York; or

(c) are inconsistent with any express provision of this Policy.

(2) The terms, conditions and exclusions of this Policy are to be construed in an evenhanded fashion as between **the Insured** and the **Company**. Without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant terms, conditions and exclusions of the Policy, without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either **the Insured** or the **Company** and without reference to parol or other extrinsic evidence.

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P. LIABILITY OF THE COMPANY

The **Named Insured** and **the Insured** agree that the liability and obligations of the **Company** hereunder shall be satisfied from the funds of the **Company** alone and that the individual shareholders of the **Company** shall have no liability hereunder to the **Named Insured** or **the Insured**.

Q. POLICY EXTENSION

Subject to Condition K(2), Coverage A of this Policy may be extended at the expiration of each **Annual Period** for another **Annual Period**, subject only to agreement between the Company and the **Named Insured** as to the applicable premium and such other terms and conditions as the **Company** and the **Named Insured** may mutually deem appropriate.

R. REINSTATEMENT

(a) At the time of each annual policy extension of Coverage A, the aggregate limit of liability set forth in Item 2(b) of the Declarations shall, unless otherwise agreed by the **Named Insured** and the **Company**, automatically be reinstated with respect to covered **Occurrences** of which notice is first given during the following **Annual Period**. There shall be no separate premium charged for this automatic reinstatement in addition to that provided for in Condition Q. above.

(b) If during any **Annual Period** the aggregate limit of liability set forth in Item 2(b) ("Original **Aggregate** Limit") of the Declarations is or may be impaired by virtue of **Occurrence(s)** of which notice has been given previously during such **Annual**

Period, then the **Named Insured** shall be entitled to one reinstatement of all or any portion of such aggregate limit, based on the following terms and conditions:

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U. NOTICE

All notices under any provision of this Policy shall be in writing and given by prepaid express courier, airmail, telex or telecopier properly addressed to the appropriate party. Notice to any **Insured** may be given to the **Named Insured** at the address shown in Item 1(b) of the Declarations or to such other person as the **Named Insured** shall designate in Item 6 of the Declarations. Notice to the **Company** shall be given to the party indicated in Item 9(a) or (b), as applicable, of the Declarations. Notice given as above shall be deemed received only upon actual receipt by the respective party designated in the Declarations.

V. SUBROGATION

In the event of any payment hereunder, the **Company** shall be entitled to exercise rights of subrogation and **the Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. In such case, the **Company** will act in concert with all other interested parties, including **the Insured**, concerned in the exercise of rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any parties, including **the Insured**, that shall have paid an amount over and above any payment hereunder shall first be reimbursed up to the amount paid by them. The

company is then to be reimbursed out of any balance then remaining up to the amount paid by it; lastly, the parties of whose interests this coverage is in excess, including **the Insured**, are entitled to claim the residue, if any. Expenses incurred in obtaining recoveries shall be apportioned among the interests sharing in such recovery in accordance with each such interest's proportionate share of the recovery.

W. HEADINGS

The descriptions in the headings and sub-headings of this Policy are inserted solely for convenience and do not constitute any part of the terms or conditions hereof.

V NOTICE OF OCCURRENCE AND/OR CLAIM

A. MANDATORY NOTICE

If a manager or equivalent-level employee of the Risk Management, Insurance or Law Department or any executive officer of the **Named Insured**, shall become aware of an **Occurrence** or **Claim** likely to involve this Policy, the **Named Insured** shall, as a condition precedent to the rights of any **Insured** under this Policy, give written notice thereof to the **Company** providing the information and documents specified in Paragraph C of this Section V.

Such notice must be given as soon as practicable and, in any event, during the **Policy Period** or the **Discovery Period**, if applicable, or in accordance with Paragraph 2(b) of Exclusion J, if applicable. Failure to provide written notice as prescribed above

shall result in a forfeiture of any rights to coverage hereunder in respect of such **Occurrence** or **Claim**.

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F. **Claim** means an oral or written demand against an **Insured** for **Damages** covered by this Policy, and includes the threat initiation of any suit or arbitration proceeding or a request for a tolling agreement.

G. **Damages** means all forms of compensatory damages, monetary damages and statutory damages; punitive or exemplary damages and costs of compliance with equitable relief, other than governmental or criminal fines or penalties, which **the Insured** shall be obligated to pay by reason of judgment or settlement for liability on account of **Personal Injury**, **Property Damage** and **Advertising Liability**, and shall include **Defense Costs**.

H. **Defense Costs** means reasonable and necessary legal costs and other expenses incurred by or on behalf of **the Insured** in connection with the defense of any **Claim**, including attorneys' fees and disbursements, law costs, premiums on attachment or appeal bonds, post-judgment interest, expenses for experts and for investigation, adjustment, appraisal and settlement, excluding the salaries, wages and benefits of **the Insured's** employees and **the Insured's** administrative expenses.

I. **Discharge** means discharge, dispersal, release or escape.

J. **Discovery Period** means the twelve (12) month period, commencing upon the **Termination Date** of Coverage A of this

Policy, and ending on the expiration of the last **Annual Period** for which Coverage B is elected as provided in Condition S hereof.

K. **General Liability Hazard** means liability not encompassed by the **Products and Completed Operations Hazard**.

L. **Hazard** means the **Products and Completed Operations Liability Hazard** or **General Liability Hazard**, as the case may be.

M. **Inception Date** means the Inception Date set forth in Item 4 of the Declarations; provided, however, that with respect to any **Insured** which becomes an **Insured** subsequent to the Inception Date, the Inception Date for that **Insured** shall be the date such person or entity became an **Insured** under this Policy, or such other date as may be agreed in writing between the **Named Insured** and the **Company**.

N. **Incidental Watercraft Use** means use by **the Insured** or any owned, leased or chartered **Watercraft** less than 75 feet in length but shall not include:

(1) use of **Watercraft** for the commercial carriage for a fee of passengers or cargo for parties other than **the Insured**;

(2) use of **Watercraft** in connection with the commercial provision of marine services to others for a fee;

(3) use of any **Watercraft** held in inventory or otherwise for lease or charter to another person by an **Insured** in the business of lease or charter of **Watercraft**; or

(4) use of **Watercraft** owned by a party other than **the Insured** which is being serviced, maintained, fueled, or tested or otherwise is in the temporary care, custody or control of **the Insured** in connection with any business operations of **the Insured** relating to **Watercraft** servicing, maintenance, fueling, testing, storage or associated or similar matters.

O. Industrial Aid Aircraft Use means use by **the Insured** of any owned, non-owned, leased or chartered **Aircraft** principallyfor the transportation of officers, employees and invited guests of **the Insured**, and having a seating capacity, exclusive of cockpit crew but inclusive of cabin crew, of no more than 20 persons, but shall not include (i) use of any **Aircraft** for commercial airline operations; (ii) use of any **Aircraft** held in inventory or otherwise for sale, lease, charter or delivery to another person by an **Insured** in the business of manufacture, sale, lease or charger of Aircraft; (iii) use of **Aircraft** for product testing or demonstration purposes; (iv) use of **Aircraft** owned by a party other than **the Insured** which is being serviced, maintained, fueled or tested or otherwise is in the temporary care, custody or control of **the Insured** in connection with any business operations of **the Insured** relating to **Aircraft** servicing, maintenance, fueling, testing, storage or associated or similar matters; or, (v) use of any **Aircraft** giving rise to liability of **the Insured** within the **Products and Completed Operations Hazard**.

P. the Insured means, except as specifically stated otherwise in this Policy, all **Insureds** as defined below:

(1) the **Named Insured** and, if the **Named Insured** is

designated in Item 1(a) of the Declarations as a partnership or **Joint Venture**, the partnership or **Joint Venture** so designated and each partner or member thereof but only with respect to his or its liability as such;

(2) (a) any subsidiary or affiliate of the **Named Insured** for any **Annual period** whose accounts as of the date of the financial statements of the **Named Insured** submitted to the **Company** most recently prior to the rating of the premium for such **Annual Period** (i) are consolidated in accordance with generally accepted accounting principles in the United States of America; (ii) in the case of any foreign **Named Insured**, any subsidiary or affiliate whose accounts would be consolidated in the financial statements of such **Named Insured** if such accounts would have been consolidated in accordance with generally accepted accounting principles in the United States of America; or (iii) were eligible for such consolidation and whose financial statements were submitted to the **Company** with such financial statements of the **Named Insured** as of such date;

(b) any subsidiary, affiliate or associated company of the **Named Insured** listed on Schedule A hereto;

(3) any present or former officer, director, stockholder or employee of any person or entity named in paragraph (1) or (2) above or (6) below, but only while acting within the scope of his duties as such, and any person or organization with respect to liability for providing real estate

management for any such person or entity named in paragraph (1) or (2) above or (6) below;

(4) any person, organization, trustee estate to whom any person or entity named in paragraph (1) or (2) above or (6) below is obligated by virtue of a written contract or agreement provide insurance such as is afforded by this Policy, but only to the extent of such obligation and only in respect of operations (other than commercial insurance operations) by or on behalf of such person or entity named in paragraph (1) or (2) above or (6) below or of facilities owned or used by such person or entity named in paragraph (1) or (2) above or (6) below;

(5) with respect to any **Automobile** owned by any person or entity named in paragraph (1), (2) or (3) above or (6) below or hired for use on behalf of any such person or entity, any person or organization legally responsible for the use thereof, provided the actual use of the **Automobile** is with the permission of such person or entity;

(6) any **Joint Venture** in which **the Insured** has an interest, but only if:

(a) **the Insured** has sole responsibility for the **Joint Venture**; or

(b) **the Insured** is obligated to provide insurance for the **Joint Venture** in its entirety such as is afforded by this Policy;

(7) It is agreed automatically to include as an **Insured** without

adjustment of premium under this Policy for any **Annual Period** any entity acquired or formed by or merged with an Insured (a "Potential Additional Insured") during such **Annual Period** provided that:

(a) the fair value of the sum of all cash, securities, assumed indebtedness and other consideration expended by all **Insureds** for any such acquisition, formation, or merger or any series of interrelated acquisitions, formations or mergers to not exceed 5% of the total annual gross revenues of the **Named Insured** and its consolidated subsidiaries and affiliates as most recently reported to the **Company** for rating purposes prior to such **Annual Period**;

(b) the incremental annual gross revenues attributable to such acquisition, formation or merger or any series of interrelated acquisitions, formations or mergers do not exceed 5% of the total annual gross revenues of the **Named**

THE DOW CHEMICAL COMPANY

SCHEDULE OF UNDERLYING INSURANCES WITH LIMITS IN EXCESS OF $100,000,000

	Coverage	Policy Period	Limits	Carrier/Participation	Premium
1.	Aircraft Liability	6-1-94 to 6-1-95	$200,000,000 Each Occurrence Exclusive of Allocated Expenses	U.S.A.I.G./100%	$295,000
2.	Marine Owned/Bareboat	2-20-94 to 2-20-95	Unlimited Except for Pollution - $500,000,00 This P&I does not apply to the Service Agreement with Dixie Carries	The American Club/ 100%	$114,237
	Time Chartered Units	2-20-94 to 2-20-95	$50,000,000 Excess of Owners Limitation Subject To Overall Limitation of $500,000,000 Each Accident	The American Club/ 100%	$232,440
	Difference in Conditions	2-20-94 to 2-20-95	$200,000,00 Each Occurrence Inclusive of Allocated Expenses Expenses Excess of $5,500,000	London Insurance Companies and Lloyd's Underwriters/100%	$391,500
3.	Aviation Products	1-23-94 to 1-23-95	$300,000,000 Each Occurrence/ Aggregate including $100,000,00 Grounding Liability	U.S.A.U/A.A.U/100%	$259,470

4.	Excess Casualty	12-1-94 to 12-1-95 Retroactive Date 1-1-86	$50,000,000/$50,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $50,000,000	X.L. Insurnace Company Ltd./ 100%	$1,600,00
5.	Excess Casualty	12-1-94 to 12-1-95 Retroactive Date	$150,000,000/$150,000,000 Occurrence/Annual Aggregate Inclusive Allocated Expenses Excess of $100,000,00	ACE Insurance Company, Ltd/100%	$2,665,000
6.	Excess Casualty	2-28-95 to 12-1-95 Retroactive Date 12-1-93	$100,000,000/$100,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $250,000,000	Star Excess Liability Insurance Company, Ltd./100%	$600,00 - Annual $453,600 - Pro Rata
7.	Excess Casualty	2-1-94 to 12-1-95 Retroactive Date 12-1-93	$50,000,000/$50,000,000 Occurrence/Annual Aggregate Inclusive allocated Expenses Excess of $250,000,000 and $350,000,000 effective 2-28-95	ACE Insurance Company Ltd/100%	Included in (5) above

Date: 9/25/95

TIMBER INSURANCE LIMITED

P. O. BOX HM 1022 • 12 PAR-LA-VILLE ROAD
•HAMILTON HM08 • BERMUDA
Telephone (809-29) 2-3434 Telex 3561 WES A BA

POLICY NO. DD0068638

ALL RISK

DOES insure the Insured, named in the declaration below, in consideration of the payment of the payment of the premium, for a loss or damage which occurs during the policy term stated in the Declarations, and in reliance upon the statements in the Declarations and subject to all terms of the policy.

DECLARATIONS:

Named Insured:	The Dow Chemical Company Midland, MI 48674
Limit:	$25,000,000 Combined Property Damage and Business Interruption
Term:	Three (3) Years from December 1, 1993
Premium:	$7,000,000
Coverage:	All Physical Loss as Defined in Attached Forms
Deductible:	Various (See Clause 11 and Endorsement 3)

INSURING AGREEMENT

The insurance afforded shall be as stated in the Coverage Endorsement (s) issued to form a part of this policy, subject to the statements in and all the terms of the Declarations applicable thereto, and to the exclusions, conditions and all other terms of this policy.

/s/ Philip M. Roels
AUTHORIZED SIGNATURE

Executed this 26th day of April, 1994.

1. **INSURED**: The Dow Chemical Company and any owned, controlled, or subsidiary companies or corporations, as now or may hereafter be constituted, in which The Dow Chemical Company owns 60 % or more of the combined voting power. However, there is no coverage for the Destic Partnerships as listed on Endorsement No. 1, Attachment A.

2. **LOSS PAYABLE**: Loss or damage, if any, hereunder shall be adjusted and make payable to The Dow Chemical Company or order.

3. **LIMIT OF RECOVERY**: This Company shall not be liable under this policy for more than $25,000,000, for loss or damage arising from one occurrence regardless of the number of locations or perils involved, nor shall liability exceed any specific sublimit applying to any insured loss. Coverage or location as stated below.

   C. $15,000,000 Boiler and Machinery

   ALL LIMITS ARE INCLUSIVE OF DEDUCTIBLES.

4. **POLICY TERM**: From 12:01 a.m. Standard Time, December 1, 1993, at location of the property insured to 12:01 a.m. Standard Time, December 1, 1996.

5. **PREMIUM**: The premium for the furst year beginning December 1, 1993 shall be $7,000,000. The premium for subsequent years to be negotiated.

6. **PROPERTY INSURED AND REPORTS OF VALUES**: This policy covers property of every description and business interruption, rental value, and extra expense as further defined herein. Property of every description includes property owned by or under the control of the Insured, for which the Insured

may be legally liable, has agreed to insure or has an insurable interest including property while in th course of construction, erection and/or installation while in the possession of contractors or others. Coverage also applies to personal property of officers, employees and guests of the Insured while on premisses of the insured. Coverage also applies to property owned by others, but in the actual constructive custody of the Insured.

This policy also covers improvements and betterments introduced by the Insured to buildings not owned by the Insured, and it is understood and agreed that for loss adjustment purposes in the event of loss or damage to such improvements and betterments, the Insured shall be considered as sole and unconditional owner of such improvements and betterments, any contract or lease to the contrary notwithstanding.

The insured shall report to the Company, once per year, all values which are then known to the insured to be covered by this contract

7. **PROPERTY EXCLUDED**:

A. Currency, money, notes, securities, deeds, growing crops, standing timber, animals (except research).

D. Property while covered under import or export ocean marine policies;

E. Watercraft while waterborne; assembled aircraft, but not excluding re removable contents, flight test or other equipment not part of the permanent design; motor vehicles licensed for highway use when not on the Insured's premises;

8. **PERILS INSURED**: Except as hereinafter excluded, this policy insures against all direct physical loss of , or damage to the insured property as well as loss resulting from the necessary interruption of business and/or extra expense.

9. **PERILS EXCLUDED**: This policy does not insure against loss or damage:

   A. Loss of currency, money, notes, securities, and deeds caused by dishonesty of Insured's employees.

   B. Due to delay or loss of markets, penalty for non-completion of contract, or compliance with contract conditions.

   C. By mysterious disappearance or shortage disclosed on taking inventory unless such loss or shortage can be reasonably shown to have been occasioned by theft or attempted theft.

   D. Caused by latent defect, ordinary wear and tear, corrosion, erosion, inherent vice, or gradual deterioration, in and of themselves except for any loss or damage resulting therefrom.

   E. Due to faulty workmanship, faulty materials, and errors in design, in and of themselves, except for any loss or damage resulting therefrom.

   F. Cause by :

      (1) hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending or expected attack:

(a) by any government or sovereign power (de jure or de facto), or by an authority maintaining or using military, naval or air forces; or

(b) by military, naval or air forces; or

(c) by an agent of any such government, power, authority or forces; it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority of forces;

(2) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

(3) Any act of any person acting on behalf of or in connection with any organization with activities directed towards the overthrow by force of the government de jure or de facto or to the influencing of it by terrorism or violence.

G. Nuclear:

(1) Loss or damage by nuclear reaction, or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, is not insured against by this policy, whether such loss be

direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by any of the perils insured against by this policy except that:

(a) This policy insures against loss by sudden and accidental radioactive contamination, including resultant radiation damage to the property covered, resulting directly from any perils such property is insured against, provided such radioactive contamination arises out of material on the Insured's premises at the locations insured by this policy, and provided, at the time of such loss, there is neither a nuclear reactor capable of sustaining nuclear fission in a self-supporting chain reaction, nor any new or used nuclear fuel which is intended for or which has been used in such a nuclear reactor, on the Insured's premises at the location insured.

(b) If fire or sprinkler leakage ensues, liability is specifically assumed for direct loss by such ensuing fire or sprinkler leakage but no including any loss due to nuclear reaction, nuclear radiation or radioactive contamination.

H. Special Exclusions

This policy does not insure against any increase of loss occasioned directly or indirectly from:

(1) enforcement of any law or ordinance regulations the construction, repair, replacement, use or demolition of property on the described premises, except that loss as

covered under Contingent Liability from Operation of Building Laws (Paragraph 36) and Decontamination expense (paragraph37) are specifically covered, or;

(2) interference at the described premises, by strikers or other persons, with rebuilding, repairing or replacing the property or with the resumption or continuation of business.

I. As respects Property in Transit:

(1) caused directly or indirectly by seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

10. **TERRITORY**: This policy covers anywhere in the world.

11. **DEDUCTIBLE**: in consideration of the premium paid, it is agreed that in the event of loss or damage from one occurrence of a nature insured hereunder, the maximum deductible shall be as follows:

A All locations are subject to a Business Interruption waiting period of ten (10) days (240 hours).

B In addition to A above, a combined Property Damage Business Interruption deductible, as scheduled below, also applies:

LOCATION	DEDUCTIBLE
Freeport, Tx	6,000,000
Oyster creek, Tx	6,000,000
Midland (Plant), MI	4,000,000
Plaquemine, LA	4,000,000
Terneuzen	4,000,000
Fort Saskatchewan	3,000,000
Sarnia	3,000,000
Stade	3,000,000
Aratu	2,000,000
Ludington, MI	2,000,000
Midland (Dow Center), MI	2,000,000
Pittsburg, CA (Plant)	2,000,000
Rheinmunster	2,000,000
Tarragona North	2,000,000
Allyn's Point, CT	1,500,000
Altona	1,500,000
Bay City (PLP Plant), MI	1,500,000
Botlek	1,500,000
Cartagena	1,500,000
Guaruja	1,500,000
Hanging Rock, OH	1,500,000
King's Lynn	1,500,000
Minneapolis, MN	1,500,000
Plaquemine, LA	1,500,000
Tarragona South	1,500,000
Bayonne (Eldorado), NJ	1,000,000
Bilbao (Axape Plant)	1,000,000
Drusenheim	1,000,000
Findlay, OH	1,000,000

LOCATION	DEDUCTIBLE
Fresno, CA	1,000,000
Ft. Saskatchewan, Ethylene Stg.	1,000,000
Joliet (Plant), IL	1,000,000
Joliet (Terminal), IL	1,000,000
Kina Ura	1,000,000
Licking River, OH	1,000,000
Cincinnati, OH	1,000,000
Kansas City, MO	1,000,000
Mauldin, SC	1,000,000
Midland, (Research Camp), MI	1,000,000
San Lorenzo	1,000,000
Talcahuano	1,000,000
Tessenderlo	1,000,000
Torrance, CA	1,000,000
Tsing Yi (Plant)	1,000,000

All other locations have a deductible of $500,000, unless otherwise noted on Endorsement No. 3 - Special Deductible Provisions.

Any location that has a Contingent Business Interruption ONLY will be subject to a ten (10) day waiting period only, they will not be subject to a combined deductible.

12. **DEFINITIONS**: The following terms wherever used in this policy shall mean:

A "Raw Stock": Material in the state in which the Insured receives it for conversion by the Insured into finished stock.

B "Stock in Process": Raw stock which has undergone any aging, seasoning, mechanical or other process of manufacture at the location(s) herein described but which

has not become finished stock.

C "Finished Stock": Stock manufactured by the Insured which in the ordinary course of the Insured's business is ready for packing, shipment or sale.

D "Merchandise": Goods kept for sale by the Insured which are not the product of manufacturing operations conducted by the Insured.

E "Normal": The condition that would have existed had no loss occurred.

F "Occurrence": Reference to loss arising out of one occurrence as used herein, means the sum total of all loss or damage insured against hereunder arising out of or caused by one event.

G "Flood": The term "flood" shall be held to mean a general and temporary condition of partial or complete inundation of normally dry land areas from:

(1) the overflow of inland or tidal waters,

(2) the unusual and rapid accumulation or run-off of surface waters from any source, or

(3) mudslide caused or precipitated by accumulation of water on or under the ground.

H Each loss by earthquake shall constitute single claim hereunder, provided, if more than one earthquake shock shall occur within any period of 72 hours during the term of his policy, each such earthquake shock shall be deemed to be a single earthquake within the meaning hereof.

I For the purpose of this insurance "gross earnings" are defined as the sum of the following:

(1) total net sales value of production (manufacturing operations),

(2) total net sales of merchandise (mercantile operations), and

(3) other earnings derived from operations of the business;

Less the Cost of:

(1) raw stock from which such production is derived,

(2) supplies consisting of materials consumed directly in the conversion of such raw stock into finished stock or in supplying the service(s) sold by the Insured,

(3) merchandise sold, including packaging materials therefor, and

(4) service(s) purchase from a outsiders (not employees of the Insured) for resale which do not continue under contract. In determining gross earnings, due consideration shall be given to the experience fo the business before the date of damage or destruction and the probable experience hereafter had no loss occurred.

J. The term "extra expense", wherever used in this form, is defined as the excess (if any) of the total cost incurred during the period of restoration chargeable to the operation

of the Insured's business, over and above the total cost that would normally have been incurred to conduct the business during the same period had no damage occurred. Any salvage value of property obtained or temporary use during the period of restoration, which remains after the resumption of normal operations, shall be taken into consideration in adjustment of any loss hereunder.

13. **VALUATION**: In case of loss to property insured hereunder, the basis of adjustment shall be as follows:

A Raw material, supplies and other merchandise not manufactured by the Insured - the replacement cost as of he time of settlement and place of loss.

B Work in process - value of raw material, labor and applicable overhead at time of settlement and place of loss.

C Finished goods - market value at the time of settlement and place of loss.

D Valuable papers, records, and data processing media - full reproduction cost as of th time of settlement and place of loss, if replaced, otherwise at original cost to the Insured (including labor, material, supplies, research and development expenses and overhead).

E Animals - replacement cost at time of settlement and place of loss. This shall include, but not be limited to original cost, labor, material, supplies, research and development expenses and overhead.

F Property in transit - amount of invoice, including prepaid or advanced freight, if any, the profit or commission of the named Insured as selling agent, and such other costs and

charges as may have accrued and become legally due thereon since shipment. In the absence of an invoice, the property shall be valued at its actual cash value at point of shipment.

G All other property - actual cash value at time of settlement and place of loss plus overhead, of any, unless required by contract to insure for full replacement value and in such case values will be reported on the same basis.

14. **DEBRIS REMOVAL:** This policy covers the Insured's expenses incurred in the removal of debris from property covered hereunder remaining after any loss hereby insured against.

15. **SUBROGATION**: This insurance shall not be invalidated should the Insured waive prior to a loss any or all right of recovery against any party for loss occurring to the property described herein. The right of subrogation against the Insured and/or subsidiary and/or affiliated Companies and/or any other Companies associated with the Insured through ownership or management and/or officers and/or employees of the Insured. Is hereby waived.

16. **OTHER INSURANCE**: The Company shall not be liable for loss if, at the time of loss there is any other insurance which would attach it this insurance had not bee effected, except that this insurance shall apply only as excess and in no event as contributing insurance, and then only after all other insurance has been exhausted except where required by contract to be primary.

17. **APPRAISAL**: If the Insured and the Company fail to agree as to the amount of loss, each shall on the written demand of either, made within sixty days after receipt of proof of loss by

the Company select a competent and disinterested appraiser, and the appraisal shall be made at the reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request fo the Insured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal and umpire. The Company shall not be held to have waved any of its rights by any act relating to appraisal.

18. **SUE AND LABOR**: In case of loss, it shall be lawful and necessary for the Insured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance, nor shall the acts of the Insured or the Company, in recovering, saving and preserving and the property insured in case of loss be considered a waiver or and acceptance of abandonment. The expenses so incurred shall be borne by the Insured and the Company proportionately to the extent of their respective interests. The Company's portion of such expenses shall be limited to the extent that such expenses reduce the loss which would otherwise be payable under this policy. This provision does not increase any amounts or limits of insurance provided by this policy and deductible provisions shall apply to any expenses so incurred.

19. **CARRIERS OR BAILEES**: This insurance shall not inure directly or indirectly to the benefit of any carrier nor without the affirmative consent of the Insured, to the benefit of any other bailee. The Insured may accept without prejudice to this insurance the ordinary bills-of-lading used by common carriers, including released or partially released value bills-of-lading, and the Insured may waive subrogation against railroads under Side Track Agreements. The Company shall

not be liable for any loss or damage which, without its consent, has been settled or compromised by the Insured.

20. **WAIVER**: All of the conditions contained herein or subsequently endorsed shall supersede and entirely replace all conditions appearing in the policy to which this form is attached.

21. **ASSIGNMENT**: Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

22. **CANCELLATION**: This policy may be cancelled either by the Insured or by the Company by mailing to the other at the address shown in this policy written notice stating when not less than ninety (90) days hereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice as effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Insured or the Company shall be equivalent to mailing. If the Insured or the Company cancels, the Company shall refund the excess of paid premium above the pro-rata premium for the expired time. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective.

23. **ERRORS AND OMISSIONS**: This insurance shall not be prejudiced by any unintentional error or omission by the Insured.

24. **LOSS REINSTATEMENT**: Except as respects losses subject to the annual aggregate limits of liability shown in Clause 3. of this policy, loss hereunder shall not reduce the amount of this policy.

25. **CONTROL OF DAMAGED PROPERTY**: The Insured shall retain full rights and control of damaged property. Any salvage value recoverable by the Insured shall be applied against the amount of the total loss.

26. **BUSINESS INTERRUPTION INSURANCE**: In the event of loss or damage insured against hereunder during the term of this policy to the property described herein which necessitates the partial or total suspension of business, the Company shall be liable for the actual loss sustained by the Insured resulting directly from such interruption of business, but not exceeding the reduction of gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of the policy, provided, however, a producing facility shall not be presumed to have been rebuilt, repaired, or replaced until such time as production therefrom is realized in quantity and quality equal to that reasonably expected had no loss occurred.

27. **RESUMPTION OF OPERATION**: It is a condition of this insurance that if the Insured could reduce the loss resulting from the interruption of business:

    A by complete or partial resumption of operation of the property herein described, whether damaged or not, or

    B. by making use of raw stock, stock in process, finished stock merchandise or other property at the location(s) described herein or elsewhere,

    such reduction shall be taken into account in arriving at the amount of loss hereunder.

28. **EXPENSE TO REDUCE LOSS**: This policy also covers:

A. such expenses as are necessarily incurred for the purpose of reducing loss under this policy, and

B. such expenses, in excess of normal, as would necessarily be incurred in replacing any finished stock used by the Insured to reduce loss under this policy,

but in no event shall the aggregate of such expenses exceed the amount by which the loss otherwise payable under this policy is thereby reduced.

29. **EXTRA EXPENSE**: In the event of loss or damage to a non-manufacturing facility, whether or not on a manufacturing premises, this policy also covers the necessary extra expense incurred by the Insured to continue the normal conduct of the Insured's business.

30. **IMPOUNDED WATER**: In the event that water is used as a raw material or for power or for other manufacturing purpose, stored behind dams or in reservoirs is released from storage as a result of damage to or destruction of such dam or reservoir by loss of a nature insured hereunder this policy covers loss, if any, directly resulting from the interruption of business caused by lack of adequate water supply from such sources, limited, however to not exceeding thirty (30) consecutive days after such length of time as would be required with the exercise of due diligence and dispatch to repair or replace the damaged or destroyed dam or reservoir.

31. **ALTERATIONS, ADDITIONS AND RENOVATIONS**: This policy also insures business interruption loss due to damage or loss to property while in the course of construction, erection and/or installation.

In the event of loss or damage insured against to property under construction and insured by this policy, the measurement of the resulting actual loss sustained shall be in accordance with the following:

A. Computed for a period of time equivalent to the time in which, with due diligence and dispatch, the property could be repaired or replaced. This equivalent period of time shall be applied to the experience of the business after the business has reached planned level of production or planned level of business operations. Neither period of time mentioned above is limited by the day of expiration named in this policy.

B. In determining the indemnity payable under this clause, due consideration shall be given to the available experience of the business compiled after completion of the construction.

32. **INACCESSIBILITY TO PROPERTY**: The business interruption coverage afforded hereunder is extended to include the Insured's loss if access to the Insured's property is prohibited by order of civil authority or is impossible because of loss or damage to property of others in the vicinity when such loss or damage is of the type insured under this policy.

33. **SERVICE INTERRUPTION**: This policy, subject to all its provisions and without increasing the amount of said policy, also insures against loss caused by damage to the property owned or used by any service supplier of electricity, gas, water, steam, waste disposal, or similar services when used exclusively for the service of the Insured.

34. **CONTINGENT BUSINESS INTERRUPTION**: This policy also covers a business interruption loss at the Insured's

premises because of the inability of a supplier to deliver materials, supplies, and goods to the Insured or the inability of a customer to accept goods from the Insured as a result of damage of a nature insured hereunder to the property of the supplier or the customer.

35. **NON-PRODUCTIVE FACILITY CONTINUING EXPENSES**: This policy also covers such charges and expenses, including payroll, as must necessarily continue during the loss of use of such non-manufacturing facility to the extent that such charges and expenses including payroll would have been incurred had no damage or destruction occurred.

36. **CONTINGENT LIABILITY FROM OPERATION OF BUILDING LAWS**: This policy, subject to all its provisions, also insures against loss occasioned by the enforcement of any law or ordinance regulating the construction or repair of building(s) and/or structures and in force at the time such loss occurs, which necessitates the demolition of any portion of the insured buildings and/or structures not damaged, including;

A. cost of demolishing or clearing the site of undamaged portions of the building(s) and/or structures;

B. actual cash value at the time of the loss of the buildings(s) and/or structures, or any part thereof, damaged by perils insured against or demolished due to the enforcement of any law or ordinance;

C. increased cost of repair or reconstruction to conform with building laws;

D. loss due to the additional period of time required for repair or reconstruction in conformity with the minimum standards of such law or ordinance, 0of the buildings(s)

and/or structures described in this policy damaged by a peril insured against.

(THIS COVERAGE SHALL NOT COVER ANY INCREASE IN LOSS OCCASIONED BY THE ENFORCEMENT OF ANY LAW OR ORDINANCE REGULATING ANY FORM OF POLLUTION.)

37. **DECONTAMINATION EXPENSE**: In the event of loss or damage insured against hereunder, this policy also covers the reasonable cost of necessary decontamination of land, and real and personal property of the Insured.

This insurance does not apply to loss arising out of the correction of any condition which existed prior to the occurrence giving rise to the loss.

38. **REQUIREMENTS IN CASE LOSS OCCURS**: T h e Insured shall give notice to Timber Insurance limited, 1320 Waldo Avenue, Suite 200, Midland, Michigan 48642 as soon as practical o any loss which may reasonably be expected to exceed the deductible and protect the property from further damage that might result in extension of the period of interruption of business or other loss.

It shall be necessary for the Insured to render a signed and sworn proof os loss to the Company or its appointed representative stating: the place, time, and cause of the loss, damage, or expense; the interest of the Insured and of all others; the value of the property involved in the loss; and the amount of loss, damage or expense.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by the Company all that remains of any property herein described, and submit to

examinations under oath by any person named by the Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of accounts, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representative and shall permit extracts and copies thereof to be made.

39. **AUTHORITIES EXCLUSION**: Notwithstanding any of the preceding provisions of this policy, except in respect of certain specific coverage(s) provided elsewhere in this Policy, this Policy does not insure against loss, damage, costs, expenses, fines or penalties incurred or sustained by or imposed on the Assured at the order of any Government Agency, Court or other Authority arising from any cause whatsoever.

40. **CONSEQUENTIAL LOSS**: In the event of direct damage insured hereunder to any covered property, should such damage, without the intervention of any other independent cause, result in a sequence of events which causes physical damage to other insured property, then there shall be coverage for the resulting loss.

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NOVATION AT INCEPTION

This Agreement is by and among The Dow Chemical Company ("Dow"), Timber Insurance Limited ("Timber") and Dorintal Reinsurance Limited ("Dorintal").

The parties stipulate and recite that:

A. Dow and Timber entered into various insurance agreements from the period 12/1/94 - 12/1/95.(Exhibit A is attached hereto) ("the Insurance Agreements").

B. Timber desires to be discharged from the performance of the obligations enumerated in the Insurance Agreements.

C. Dow desires to release Timber from obligations as described in the Insurance Agreements provided that Dorintal agrees to perform the obligations and to be bound by the terms of the Insurance Agreements.

For the reasons recited above, and in consideration of the mutual covenants contained herein, the parties agree as follows:

1. Dorintal shall perform, and be liable for, the obligations of Timber that are enumerated under the Insurance Agreements and Dorintal agrees to be bound by all the terms of the Insurance Agreements in every way retroactively as of its original effective date as if an original party thereto.

2. Dow releases Timber from all claims for any liability that has arisen or may have arisen in respect to the Insurance Agreements. Dow accepts the liability of Dorintal in lieu of the liability of Timber. Dow shall be bound by the terms of the

original contract in every way as if Dorintal was named in the original contract in place of Timber as a party thereto.

3. As between Dow and Timber, this agreement supersedes the Insurance Agreements and all the rights and obligations under the Insurance Agreements are completely extinguished.

4. Dorintal will receive credit for all premiums, reserves and paid losses since inception.

5. This agreement has been executed in triplicate, and all the parties to this agreement have received a signed copy of it.

6. Dow, Timber and Dorintal consent to all the provisions of this agreement.

In witness whereof, the parties hereto have caused this agreement to be executed by their respective officers duly authorized so to do.

THE DOW CHEMICAL COMPANY

by: /s/ G.A. Heinz

G. A. Heinz, Corp. Risk Mgr.
Print Name and Title

Date: December 5, 1995

DORINTAL REINSURANCE LIMITED

by: /s/Philip M. Roels

Philip M. Roels, Vice President
Print Name and Title

Date: December 15, 1995

TIMBER INSURANCE LIMITED

By: /s/ Paul D. Brink

Paul D. Brink, President
Print Name and Title

Date: December 15, 1995

EXHIBIT A

EFFECTIVE DATE	POLICY #	DESCRIPTION
1/1/95	DD68648-95	DOW PRODUCTS
12/1/94	DD68647-95	DOW EXCESS LIABILITY
12/1/94	DD68646-95	DOW POLLUTION
12/1/94	DD68638-95	DOW GLOBAL PROPERTY
12/1/94	DD68639-95	DOW GLOBAL PROPERTY XS
12/1/94	DD68642-95	DOW GLOBAL PROPERTY HPR
12/1/94	DD68650-95	DOW GLOBAL PROPERTY EQ

TIMBER INSURANCE LIMITED

P. O. BOX HM 1022 • 12 PAR-LA-VILLE ROAD
•HAMILTON HM08 • BERMUDA
Telephone (809-29) 2-3434 Telex 3561 WES A BA

ENDORSEMENT NO. 35

This Endorsement, effective June 1, 1995, forms a part of TIMBER INSURANCE LIMITED Policy No. 68638, issued to The Dow Chemical Company et al.

TEXAS OPERATIONS:

In the event of a Hurricane and outside contractors are requested to stay in the Plant for Hurricane duty, and their automobiles are damaged because of the Hurricane, Texas Operations will reimburse each contractor employee, who sustains automobile damage because of the Hurricane, up to $2,000.

In the event this payment is made it will be applied to the Texas Operations per occurrence combined deductible of $6,000,000.

All other terms and conditions remain unchanged.

TIMBER INSURANCE LIMITED

BY: /s/ Philip M. Roels
Philip M. Roels
Vice President

Executed this 30th day of August 1995

AFFIDAVIT OF GARY JOHNSON

BEFORE ME, the undersigned Notary Public, personally appeared Gary Johnson who upon his oath stated as follows:

1. I, Gary Johnson, am over the age of 18 years of age and of sound mind and body and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and they are true.

2. I am presently employed by the Comptroller of Public Accounts as Supervisor of the Insurance Tax Section of Tax Policy. As supervisor of insurance taxes my responsibilities include: Reviewing statutes, developing policies and rules, drafting proposed legislation and answering taxability questions.

3. Prior to coming to the Comptroller's Office I was employed by the Texas Department of Insurance. I transferred to the Comptroller's Office as a result of the transfer of the insurance tax function from the Texas Department of Insurance. My last position with the Department of Insurance was Director of Tax Administration. In that capacity my responsibilities included administering and collecting taxes, fees and assessments, drafting and evaluating agency rules and policies relating to insurance taxes, answering taxpayer inquiries about insurance taxes, statutes, rules and policies, and providing advice to agency personnel concerning tax issues, etc.

4. As a result of my duties, I am familiar with the construction of the Texas Insurance Code articles and the policies which have been implemented by the State Board of Insurance, the Texas Department of Insurance and Comptroller of Public Accounts in administering this tax. As a result of the transfer of the insurance tax function, the Comptroller has the statutory authority to administer, collect and assess taxes for all periods, including periods prior to the transfer of the function from the Texas Department of Insurance.

5. I am familiar with the facts of this case and the Texas statutory and premium tax filing requirements of licensed insurance companies, surplus lines agents and other entities subject to premium taxes under the Texas Insurance Code.

6. Texas insurance risks can be insured in one of four ways: From insurers licensed in Texas, from eligible surplus lines insurers through Texas surplus lines agents, from non-licensed insurers whereby the insured procures the insurance outside of Texas (independently procured), and from a non-licensed insurer whereby the insured procures the insurance inside this state (unauthorized insurance).

7. Licensed insurers are subject to a gross premiums receipts tax on the insurance premiums on Texas risks.

8. Surplus lines agents placing insurance through the surplus lines marketplace collect a 4.85% premium tax on the Texas portion of the risk, from the insured, at the time of the transaction. These agents file an annual tax report with the Texas Comptroller's Office.

9. Individuals "independently procuring" insurance are required to report and pay a 4.85% premium tax on the Texas portion of the risk to the Texas Comptroller's Office.

10. Non-licensed insurers writing insurance in this state are subject to an "unauthorized insurance" premium tax of 4.85%.

11. Independently Procured tax forms have been included in Franchise Tax Report packet mailings for most tax years beginning on or before 1980. Attached to my affidavit as Exhibit A are copies of the Texas independently procured tax forms and instructions for tax years 1991 - 1998.

12. Insurers domiciled in the United States, other than stipulated premium companies, local mutual aids and farm mutual companies, are required to file an annual statement with the National Association of Insurance Commissioners. The annual statements include on Schedule T, a breakdown of premiums allocated to each state based on locations of the risks. This information is used by tax auditors to verify premium

writings in Texas for each insurer, whether licensed or not licensed in Texas.

13. Independently procured taxes were administered and collected by the Texas Department of Insurance until 1995 when the authority for the collection was transferred to the Comptroller's Office.

14. Official records of the Texas Comptroller indicate that for tax year 1998, 2,537 companies reported and paid $7,351,436 in independently procured taxes. Attached as Exhibit B are copies of official records of the Texas Comptroller's Office for tax year 1993-1998 detailing the number of taxpayers and the amount of taxes collected under the independently procured statute. The records indicate payments of taxes at both 3.85% and 4.85% rates which reflect the two tax rates for this tax. The tax rate was changed in tax year 1993 from 3.85% to 4.85% and taxpayers still file and report taxes for periods prior to 1993.

15. The Texas Department of Insurance, prior to the transfer of the insurance tax function to the Comptroller's Office, adopted by rule the 1991 version of the independently procured tax form and instructions. Attached as Exhibit C is a copy of rule 28 TAC §7.51 adopting the tax form and instructions.

16. The substance of the independently procured tax forms and instructions has been the same since at least 1980 to the present.

17. As of 1996, at least 36 states have independently procured (direct procurement) tax statutes. Attached as Exhibit D is a copy of a schedule titled "Direct Procurement Tax Laws By State" produced by Kroll, Rubin & Fiorella LLP.

Further the Affiant sayeth not.

/s/ Gary Johnson
GARY JOHNSON

APPENDIX C

CAUSE NO. 9905725

DOW CHEMICAL COMPANY	§	IN THE DISTRICT
	§	
V.	§	COURT OF TRAVIS
	§	
CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, and JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	COUNTY, TEXAS
	§	250TH JUDICIAL
	§	DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Dow Chemical Company files this Motion For Summary Judgment supported by the attached Affidavits of Nancy Kanter, Tracy Perry, and Ray Langenberg.

Summary

This is a taxpayer's suit following payment under protest of $427,148.80 for an independently procured insurance tax audit assessment by the Comptroller. The protest payment should be refunded to Dow because the independently procured insurance tax has been declared invalid by the United States Supreme Court.

Argument

The independently procured insurance tax is a tax on insurance policies covering Texas risks, but which were negotiated outside the state with an insurance carrier not licensed in Texas. In 1962, the United States Supreme Court declared that the Texas independently procured insurance tax violated the McCarran-Ferguson Act (15 U.S.C. § 1011), which was adopted by Congress through its constitutional power to regulate interstate commerce. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S.451, 82 S. Ct. 1380 (1962). The Court held that the "power of Congress to grant protection to interstate commerce against state regulation or taxation . . . is so complete that its idea of policy should prevail." *Id.*, 370 U.S. at 456, 82 S. Ct. at 1384. Therefore, the State could not tax insurance procured outside the state because it was an activity protected by Congress under the McCarren-Ferguson Act through its power under the Commerce Clause. *Id.*

At the time of the *Todd Shipyards* case, the independently procured insurance tax statute was codified in article 21.38 § 2(e) of the Texas Insurance Code, which provided as follows:

> If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance.

Todd Shipyards, 370 U.S. at.453, 82 S.Ct. 1382 at n. 2.

In 1967, the Texas Legislature repealed article 21.38, and in the same act, adopted article 1.14-1, which re-enacted the independently procured insurance tax. A copy of excerpts from the legislation is attached as Exhibit 1 to the Affidavit of Ray Langenberg. Acts of 1967, 60th Leg., R.S., ch. 185, 1967 Tex. Gen. Laws 401. *See also*, Tex. Ins. Code art. 21.38 (Vernon 1981) (Historical Note) and art. 1.14-1 (Vernon 1981) (Historical Note). The Comptroller contends that the new statute is constitutional. However, the Legislature cannot make a statute constitutional simply by repealing the old statute and adopting the same statute under a different section number.

The comparison of the current statute[1] and the former statute shows that the two statutes have the same operative terms. In fact, the Historical Notes to the Insurance Code state that the source of article 1.14- 1 is former article 21.38. *See* Tex. Ins. Code art. 1.14-1 (Vernon 1981) (Historical Note). The current statute provides:

> (a) Every insured who procures insurance in accordance with Section 2(b)(4) of this Article must file a report with the comptroller and pay an independently procured insurance tax of 4.85 percent.

---

[1] Since Article 1.14-1 was adopted in 1967, the Legislature amended the article to substitute the Comptroller for the State Board of Insurance, to change the tax rate from 3.85% to 4.85%, and to reorganize the statute. However, the scope of the article has remained the same from 1967 to the present. *See* Acts of 1993, 73th Leg., R.S., ch. 685, 1993 Tex. Gen. Laws; Acts of 1993,73th Leg., R.S., ch. 999, 1993 Tex. Gen. Laws; Acts of 1995, 74th Leg., R.S., ch. 279, 1995 Tex. Gen. Laws.

Tex. Ins. Code art. 1.14-1 § 12(a) (Vernon Supp. 1998). The current statute references insurance procured "in accordance with Section 2(b)(4)", and that section describes:

> transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premiums tax is paid in accordance with this Article.

Id. § 2(b)(4) (Vernon Supp. 1998).

According to Comptroller Form 25- 103 (attached as Exhibit 2 to the Affidavit of Ray Langenberg), the following criteria apply to independently procured insurance under the current statute:

1. The insurance contract was negotiated entirely outside of this state;
2. The insurance carrier is not licensed to place business in this state;
3. At least some of the premiums are on Texas risks; and
4. Taxes on the premium have not been paid by a surplus lines agent or a registered purchasing group.

The criteria of the current statute match the criteria of the old, invalid statute and the activity protected from taxation by the McCarren-Ferguson Act:

> . . . contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State. . .

Todd Shipyards, 370 U.S. at 455-56; 82 S. Ct. at 1383, quoting a Congressional House Report. The Legislature cannot make the tax constitutional by simply repealing the old statute and adopting the same statute under a different section number. Therefore, the assessment is invalid.

Conclusion

Plaintiff requests the Court to grant this motion for summary judgment and render judgment for Plaintiff refunding the amount paid under protest with interest provided by section 112.060 of the Texas Tax Code or section 403.211 of the Texas Government Code and costs of court.

Respectfully submitted,

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No. 01-442

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

CAROLE KEETON RYLANDER, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND JOHN CORNYN, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petitioners,

v.

THE DOW CHEMICAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE NAIC[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The members of the NAIC completely control the same.

In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Annual Report, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
>
> 2. Promote the reliability, solvency, and financial solidity of insurance institutions; and

---

[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

3. Support and improve state regulation of insurance.

The members of the NAIC believe that the decision of the Texas Court of Appeals is in direct conflict with the procurement tax systems in place in the forty-four states that have enacted the NAIC Nonadmitted Insurance Model Act and its implementing regulation, the NAIC Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks Model Regulation, or similar legislation and regulations. The original NAIC *Unauthorized Insurers Model Act* was adopted by the NAIC in 1969. While renamed and amended, it has been a continuous model act of the NAIC since that date. The Texas Court of Appeals has now held, thirty-two years later, that the Texas laws incorporating the NAIC model act and regulation are in conflict with the McCarran-Ferguson Act and are therefore unenforceable. The members of the NAIC, including the Texas Commissioner of Insurance, strongly disagree.

The NAIC is concerned that, if the Texas decision is allowed to stand, purchasers of insurance will have a strong financial incentive to purchase nonadmitted insurance from foreign and alien insurers, creating a loss in premium tax revenue to the state in which the subject of the risk insured against is located.

The NAIC asks that this Honorable Court grant the Petition for Writ of Certiorari. The members of the NAIC believe that a review of the decision of the Texas Court of Appeals is in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and control the

NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

The members of the National Association of Insurance Commissioners believe that the plain language of the McCarran-Ferguson Act allows states to tax insurance transactions in any way permitted by the Due Process Clause of the United States Constitution. The Texas Court of Appeals has held otherwise.

The inability of a state to allocate and assess procurement tax liability when an insurance risk is located partially or entirely in the state will result in inequities in the taxing system. Most states assess a procurement tax authorized by legislation based on the NAIC model and have thus created a multi-state system of equitable tax allocation. States that protect an insurance risk by providing services that reduce the risk will be deprived of the taxes on the insurance transaction simply because the insurance contract was signed in another state or country. Insurance consumers are encouraged to purchase nonadmitted insurance in those jurisdictions with the lowest tax rate. Those jurisdictions may not allocate the tax liability. The members of the NAIC do not believe this result is required under the McCarran-Ferguson Act or desirable.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE TEXAS COURT OF APPEALS HAS INTERPRETED THE MCCARRAN-FERGUSON ACT IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT AND SEVERAL STATE COURTS OF LAST RESORT AND TEXAS WILL BE COMPELLED TO ADMINISTER ITS INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX IN A WAY THAT WILL CONFLICT WITH THE TAXING METHODS OF FORTY-THREE STATES.

This Court has stated that the plain language of the McCarran-Ferguson Act shall control its meaning. The Act itself states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

15 U.S.C. § 1011. In response to the argument that the Act restricts the regulation of insurance by the states to what the tax laws were at the time of its passage, this Court stated:

> More importantly, petitioner's interpretation of the statute is at odds with its plain language. The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. . . . it is impossible to compare our present world to the one that existed at a time when the business of insurance

> was believed to be beyond the reach of Congress' power under the Commerce Clause.

United States v. Fabe, 508 U.S. 491, 507-508 (1993).

Yet, the Texas Court of Appeals has imposed such a barrier and it restricts the ability of Texas to impose a tax upon the business of insurance in a manner that is entirely proper under the Due Process Clause of the U.S. Constitution, despite the plain language of the McCarran-Ferguson Act.

The allocation method of assessing the particular tax at issue in this cause, a tax imposed upon the premiums paid for independently procured insurance policies, is in use by a significant majority of states and is considered fair and equitable. Section 6 of the NAIC Nonadmitted Insurance Model Act sets out the mechanics of this tax, which reflects that "the tax payable shall be computed on the portion of the premium properly attributable to the properties, risks or exposures located or to be performed in this state. . . . " Sec. 6 C., Nonadmitted Insurance Model Act, NAIC, *Model Laws, Regulations and Guidelines*, Vol. V, p. 870 (1999). The NAIC has also adopted a model regulation that sets forth formulas, categories of risks and reporting forms for implementing this tax. Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks Model Regulation, NAIC, *Model Laws, Regulations and Guidelines*, Vol. V, p. 872 (1995). As reported in the *Compilation of Minutes* of the 2001 Summer National Meeting of the NAIC[2], set out

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[2] The *Compilation of Minutes* will be published as the *2001 Proceedings of the NAIC, 2nd Quarter.*

in the Appendix to this brief, this method of taxation is in use by the great majority of states.

Deprived of its ability to assess a justifiable tax upon out-of-state insurance purchases using the fair and equitable allocation method, Texas will likely have no choice but to make up for the shortfall in tax revenue by assessing full tax liability upon those insurance purchases occurring within its borders that protect risks which are in whole or in part not located within its borders. This may cause insureds to incur a greater tax burden, deprive other states of tax revenue that they would otherwise receive and motivate sophisticated insureds to conduct insurance transactions offshore. The members of the NAIC do not believe any of these outcomes are desirable. Other states may in return take similar actions to protect their tax revenue, thus abandoning the system envisioned by the members of the NAIC when they adopted the Nonadmitted Insurance Model Act and its predecessor model acts.

Many state courts of last resort have long ago held that the Due Process Clause is not offended when a state assesses taxes on out-of-state insurance transactions. *E.g.*, *Ministers Life and Casualty Union v. Haase*, 141 N.W.2d 287 (Wis. 1966); *Howell v. Rosecliff Realty Co.*, 245 A.2d 318 (N.J. 1968). In *Howell*, the New Jersey Supreme Court set out why this issue is of importance to the NAIC members:

> The insurance industry is highly regulated to the end that insurance will be written fairly and by companies that are financially sound. When coverage cannot be obtained from fully authorized carriers at filed rates, the insurance, then

> called 'surplus,' may be placed elsewhere. . . . Insurance is so essential a part of the area of a State's primary responsibility that the State's power should not depend upon where the parties choose to contract for the insurance or to pay the loss. The State's interest and its responsibility to its citizens should be enough to support regulation and taxation of policies relating to the risks within its jurisdiction.

Howell, 245 A.2d at 316, 324. This Court has previously ruled that the Commerce Clause is not offended by such a tax. "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. . . . The unequivocal language of the Act suggests no exceptions." *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653 (1981). This Court also noted that the limits of the Due Process Clause were not expanded or contracted by the McCarran-Ferguson Act:

> We reject appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause. The House Report states: . . . your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court. . . . "

Id. at 656, n. 6. Thus, *amicus curiae* believes that this Court's current controlling decisions on the limits of the Due Process Clause must be utilized to determine if the Texas independently procured insurance tax is allowable,

not the long surpassed decisions of this Court handed down in 1897, 1922 and 1938.[3]

CONCLUSION

The members of the National Association of Insurance Commissioners believe that the McCarran-Ferguson Act grants them wide flexibility in the regulation and taxation of the business of insurance, within the limits of the Due Process Clause as set out in the current decisions of this Honorable Court. The members believe that any restriction in this flexibility is not consistent with federal law and this Court's jurisprudence and, ultimately, will harm insurance consumers, whom the members of the NAIC are charged by both State and Federal law to protect.

Respectfully submitted,

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[3] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); *Connecticut Gen. Life Ins. Co. v. Arkansas*, 303 U.S. 77 (1938).

APPENDIX

NONADMITTED INSURANCE MODEL ACT

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Section 1. Short Title

This Act shall be known and may be cited as "The Nonadmitted Insurance Act."

Section 2. Purpose – Necessity for Regulation

This Act shall be liberally construed and applied to promote its underlying purposes which include:

A. Protecting persons seeking insurance in this state;

B. Permitting surplus lines insurance to be placed with reputable and financially sound nonadmitted insurers and exported from this state pursuant to this Act;

C. Establishing a system of regulation which will permit orderly access to surplus lines insurance in this state and encourage admitted insurers to provide new and innovative types of insurance available to consumers in this state;

D. Providing a system through which persons may purchase insurance other than surplus lines insurance, from nonadmitted insurers pursuant to this Act;

E. Protecting revenues of this state; and

F. Providing a system pursuant to this Act which subjects nonadmitted insurance activities in this state to the jurisdiction of the insurance commissioner and state and federal courts in suits by or on behalf of the state.

Section 3. Definitions

As used in this Act:

A. "Admitted insurer" means an insurer licensed to do an insurance business in this state.

B. "Capital," as used in the financial requirements of Section 5, means funds paid in for stock or other evidence of ownership.

C. "Commissioner" means the insurance commissioner of [insert name of state] , or the commissioner's deputies or staff, or the Commissioner,

Director or Superintendent of Insurance in any other state.

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

D. "Eligible surplus lines insurer" means a nonadmitted insurer with which a surplus lines licensee may place surplus lines insurance pursuant to Section 5 of this Act.

E. "Export" means to place surplus lines insurance with a nonadmitted insurer.

F. "Foreign decree" means any decree or order in equity of a court located in any United States jurisdiction, including a federal court of the United States, against any person engaging in the transaction of insurance in this state.

G. "Insurer" means any person, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, insurance exchange syndicate, fraternal benefit society, and any other legal entity engaged in the business of insurance.

H. "Kind of insurance" means one of the types of insurance required to be reported in the annual statement which must be filed with the commissioner by admitted insurers.

I. "Nonadmitted insurer" means an insurer not licensed to do an insurance business in this state.

J. "Person" means any natural person or other entity, including, but not limited to, individuals, partnerships, associations, trusts or corporations.

K. "Policy" or "contract" means any contract of insurance, including but not limited to annuities, indemnity, medical or hospital service, workers' compensation, fidelity or suretyship.

L. "Reciprocal state" means a state that has enacted provisions substantially similar to:

(1) Sections 5F, 5I(5), 5Q(10), 5R(4) and Section 6; and

(2) The allocation schedule and reporting form contained in [cite the regulation on surplus lines taxation].

Editor's Note: This model regulation does not yet exist, but is in the process of development.

M. "Surplus," as used in the financial requirements of Section 5, means funds over and above liabilities and capital of the company for the protection of policyholders.

N. "Surplus lines insurance" means any property and casualty insurance in this state on properties, risks or exposures, located or to be performed in this state, permitted to be placed through a surplus lines licensee with a nonadmitted insurer eligible to accept such insurance, pursuant to Section 5 of this Act.

Drafting Note: If a state chooses to adopt the alternative Section 5B, this definition of "surplus lines insurance" should be consistent with the acceptable coverage listed in Section 5B. States may choose to extend the definition of "surplus lines insurance" beyond property/casualty insurance.

O. "Surplus lines licensee" means an individual, firm or corporation licensed under Section 5 of

this Act to place insurance on properties, risks or exposures located or to be performed in this state with nonadmitted insurers eligible to accept such insurance.

P. "Transaction of insurance"

(1) For purposes of this Act, any of the following acts in this state effected by mail or otherwise by a nonadmitted insurer or by any person acting with the actual or apparent authority of the insurer, on behalf of the insurer, is deemed to constitute the transaction of an insurance business in or from this state:

(a) The making of or proposing to make, as an insurer, an insurance contract;

(b) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;

(c) The taking or receiving of an application for insurance;

(d) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for insurance or any part thereof;

(e) The issuance or delivery in this state of contracts of insurance to residents of this state or to persons authorized to do business in this state;

(f) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

(g) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of risks with respect to properties, risks or exposures located or to be performed in this state;

(h) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;

(i) The offering of insurance or the transacting of insurance business; or

(j) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

(2) The provisions of this subsection shall not operate to prohibit employees, officers, directors or partners of a commercial insured from acting in the capacity of an insurance manager or buyer in placing insurance on behalf of the employer, provided that the person's compensation is not based on buying insurance.

(3) The venue of an act committed by mail is at the point where the matter transmitted by mail is delivered or issued for delivery or takes effect.

Drafting Note: States may need to alter this subsection to reflect their decision as to whether they intend to permit citizens to directly purchase coverage within the state from a nonadmitted insurer, or if self-procurement of coverage will be permitted only when it occurs outside the state. States electing to allow direct procurement will need to insert an appropriate exemption in Section 4A of this Act. Additionally, states should consider whether the preceding definition of "transaction of insurance" is consistent with other statutory definitions of this phrase in the state. Finally, states may want to consider whether group insurance purchases or the maintenance of insurance books and records in this state should fall within the scope of the definition of "transaction of insurance."

Q. "Type of insurance" means coverage afforded under the particular policy that is being placed.

R. "Wet marine and transportation insurance" means:

(1) Insurance upon vessels, crafts, hulls and other interests in them or with relation to them;

(2) Insurance of marine builder's risks, marine war risks and contracts of marine protection and indemnity insurance;

(3) Insurance of freight and disbursements pertaining to a subject of insurance within the scope of this subsection; and

(4) Insurance of personal property and interests therein, in the course of exportation from or importation into any country, or in the course of transportation coastwise or on inland waters, including transportation by

land, water or air from point of origin to final destination, in connection with any and all risks or perils of navigation, transit or transportation, and while being prepared for and while awaiting shipment, and during any incidental delays, transshipment, or reshipment; provided, however, that insurance of personal property and interests therein shall not be considered wet marine and transportation insurance if the property has:

(a) Been transported solely by land; or

(b) Reached its final destination as specified in the bill of lading or other shipping document; or

(c) The insured no longer has an insurable interest in the property.

Comment: The language added in 1994 to the end of the definition of "wet marine and transportation insurance" {Subparagraphs 4(a), 4(b), AND 4(c)& is intended to clarify the scope of the definition, which ultimately affects the exemption of certain risks from this Act. The 1994 amendments address current regulatory concerns and concerns raised by those who drafted the 1983 amendments to the Model Surplus Lines Law. The 1983 drafters wrote: "Several [drafters] felt the term 'storage' should not appear in . . . [the wet marine definition] to ensure that warehousemen and other types of insurance covering risks of storage are not interpreted to be within the purview of this definition. The term 'delays' is sufficiently broad to cover temporary storage while in the course of transit."

Drafting Note: In addition to the definitions provided in this section, individual states may wish to consider adopting definitions for "agent," "broker" or "producer" in a manner consistent with its other laws. Additionally, states may want to cross-reference the definition of "insurance" as it appears elsewhere in the state insurance code. The definition of insurance should reach illegal unauthorized activities.

[. . .]

Section 6. Insurance Independently Procured – Duty to Report and Pay Tax

A. Each insured in this state who procures or continues or renews insurance with a nonadmitted insurer on properties, risks or exposures located or to be performed in whole or in part in this state, other than insurance procured through a surplus lines licensee, shall, within [insert number] days after the date the insurance was so procured, continued or renewed, file a written report with the commissioner, upon forms prescribed by the commissioner, showing the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of premium currently charged, and additional pertinent information reasonably requested by the commissioner.

For the purposes of this subsection, properties, risks or exposures only partially located or to be performed in this state, which are covered under a multi-state policy placed by a surplus lines licensee in another state, shall be deemed to be

insurance independently procured unless the insurer is an admitted insurer.

Drafting Note: Subsection A may need to be revised in those states exempting from taxation insurance procured by nonprofit educational institutions and their employers, from nonprofit educational insurers.

B. Gross premiums charged for the insurance, less any return premiums, are subject to a tax at the rate of [insert number] percent. At the time of filing the report required in Subsection A of this section, the insured shall pay the tax to the commissioner, who shall transmit the same for distribution as provided in this Act.

Drafting Note: Existing state laws and procedures may require that the tax report be forwarded to another state agency, such as the Department of the Treasury, rather than to the commissioner. In addition, some states may require the tax to be paid on a periodic basis (e.g. annually) rather than at the time of the filing required by Subsection A. Subsections A and B may need to be revised in these states.

C. If an independently procured policy covers properties, risks or exposures only partially located or to be performed in this state, the tax payable shall be computed on the portion of the premium properly attributable to the properties, risks or exposures located or to be performed in this state, as set forth in Sections 5F(3) and 5F(4) of this Act.

D. Delinquent taxes hereunder shall bear interest at the rate of [insert number] percent per year.

E. This section does not abrogate or modify, and shall not be construed or deemed to abrogate or modify any other provision of this Act.

[. . . .]

Legislative History (all references are to the Proceedings of the NAIC).

1994 Proc. 3rd Quarter 14, 16-17, 24, 28-46 (adopted).

1996 Proc. 3rd Quarter 9, 42, 1110, 1168, 1169-1173, 1189-1190 (amended).

1997 Proc. 4th Quarter 25, 27-28, 1004, 1029 (amended).

1999 Proc. 3rd Quarter (amended).

This model draws from and replaces three earlier NAIC models:

Model Surplus Lines Law

1983 Proc. I 6, 36, 834, 900, 913-922 (adopted).

1985 Proc. II 11, 24, 702, 722, 723-724 (amended).

1986 Proc. I 9-10, 24, 799, 813, 814-821 (amended).

1990 Proc. I 6, 30, 840-841, 897-898, 900-901 (amended).

1991 Proc. I 9, 18, 908, 949, 950, 952-961 (amended and reprinted).

Unauthorized Insurers Model Act

1969 Proc. I 168, 218, 222-227, 271 (adopted).

1978 Proc. I 13, 15, 348, 350 (amended).

1990 Proc. II 7, 13-14, 159-160, 187-191 (amended and reprinted).

App. 12

Model Nonadmitted Insurance Act

1983 Proc. 1 6, 36, 834, 899-900, 923-926 (adopted).

ALLOCATION OF SURPLUS LINES AND INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX ON MULTI-STATE RISKS MODEL REGULATION

Table of Contents

Section 1. Purpose

Section 2. Allocation of Premium Tax on Multi-State Risks

Section 3. Reporting and Remittance of Tax

Appendix A. Allocation Schedule

Appendix B. Tax Allocation Report

Section 1. Purpose

The purpose of this regulation is to:

A. Implement the provisions of Section [insert citation to state law equivalent to Section 5 of the Nonadmitted Insurance Model Act] by requiring surplus lines licensees to allocate premiums where a placement of surplus lines insurance covers properties, risks or exposures located or to be performed in various states (multi-state risks);

B. Facilitate payment of surplus lines tax or independently procured insurance tax in this state pursuant to [cite state law equivalent to Section 6 of the Nonadmitted Insurance Model Act]; and

C. Provide a mechanism by which a surplus lines licensee or insured shall allocate premiums and pay premium taxes to each state where placement of surplus lines insurance covers properties, risks or exposures located or to be performed in each state.

Section 2. Allocation of Premium Tax on Multi-State Risks

A. In determining the amount of premiums taxable in this state, all premiums written, procured or received in this state shall be presumed to be written on properties, risks or exposures located or to be performed in this state, except

(1) For a reciprocal state, premiums that are allocated or apportioned as taxable premiums of the reciprocal state in accordance with the provisions of this regulation, but the tax payable to this state shall not be less than the tax due pursuant to this regulation. However, if the amount of tax due under this provision is less than $50 in any jurisdiction, it shall be payable in the jurisdiction in which the affidavit is required to be filed; or

(2) For a nonreciprocal state, premiums that are allocated or apportioned as taxable premiums of the nonreciprocal state and the taxes have been paid to the nonreciprocal state.

B. On an insurance policy covering properties, risks or exposures located or to be performed in various states, the tax to be paid to the commissioner of each state shall be computed on that portion of the policy premium that is attributable to properties, risks or exposures located or to be performed in each state.

C. The surplus lines licensee or the insured who has independently procured insurance shall determine the taxable portion of the premium by using one of the following methods:

(1) Allocate premium on the same basis or bases used to establish the policy premium; or

(2) Allocate premium as prescribed in the allocation schedule in Appendix A of this regulation that pertains to the classification describing the coverage, subject to the following:

(a) If the allocation schedule does not identify a classification appropriate to the properties, risks or exposures being insured, the surplus lines licensee or the insured who has independently procured insurance shall use an alternative equitable method of allocation; and

(b) If a policy covers more than one classification:

(i) For any portion of the coverage identified by a classification on the allocation schedule, the tax shall be computed by using the allocation schedule for the corresponding portion of the premium;

(ii) For any portion of the coverage not identified by a classification on the allocation schedule, the tax shall be computed in accordance with Subparagraph (a) of this paragraph; and

(iii) For any portion of the coverage where the premium is indivisible, the tax shall be computed by using the method of allocation that pertains to the classification describing the predominant coverage.

D. If the information provided by the surplus lines licensee or the insured who has independently procured insurance is insufficient to substantiate its method of allocation, or if the commissioner determines that its method is incorrect, the commissioner shall determine the equitable and appropriate amount of tax due to this state, as follows:

(1) If the allocation schedule identifies a classification appropriate to the coverage, the commissioner shall use the method prescribed in Subsection C.

(2) If the Allocation Schedule does not identify a classification appropriate to the coverage, the commissioner, in determining the equitable and appropriate amount of tax due to the state, shall give significant weight to documented evidence of the underwriting bases and other criteria used by the insurer. The commissioner may also consider other available information, to the extent sufficient and relevant, such as the percentage of the insured's physical assets in this state, the percentage of the insured's employee payroll in this state, the percentage of the insured's sales in this state and the amount of premium tax paid to another jurisdiction for the policy.

Drafting Note: In some states, determination of, and payment of, tax is the responsibility of a state official other than the commissioner. Subsection D should be modified as necessary to reflect state law.

Section 3. Reporting and Remittance of Tax

A. Each licensee or insured who has independently procured insurance shall file a tax allocation report, as specified in Appendix B of this regulation. The filing of a tax allocation report and the remittance of tax may be made by a person authorized by the insured to act as its agent.

B. The commissioner shall at least annually furnish to the commissioner of a reciprocal state a copy of all filings reporting an allocation of taxes required by this section.

C. The preparation and submission of tax allocation reports and the payment of independently procured insurance taxes by a surplus lines licensee of another state to the commissioner of this state either directly or indirectly for lawful transactions taking place outside this state shall not be considered the placement of insurance in this state by the surplus lines licensee.

APPENDIX A

SURPLUS LINES PREMIUM TAX ALLOCATION SCHEDULE

Criteria for Tax Allocation of Multi-State Risks

CODE	CLASSIFICATION	ALLOCATE TO STATE BY
PROPERTY INSURANCE:		
01	Real Property (including buildings and other permanent additions)	Insured value of structures and other property in state
02	Personal Property (including inland marine)	Insured value of property permanently or principally situated in state
03	Business Interruption, Time Element, or similar time value coverages	Insured time valued elements in state
04	Farmowners, Homeowners, and Businessowners (BOP)	Insured value of structures and other property in state
05	Aircraft	Insured value of aircraft principally hangared or principally used in state
06	Motor Vehicle	Insured value of motor vehicles principally garaged or principally used in state

07	Kidnap & Ransom	Number of insured employees principally employed in state
08	Ocean Marine	None to state

FIDELITY AND SURETY:

11	Fidelity, Forgery, and other Indemnity Bonds	Number of insured employees in state
12	Bankers' Blanket Bonds	Number of insured employees in state
13	Performance Bonds	Total bond value of contracts in state
14	Other surety Bonds	Total bond value of contracts in state

CREDIT INSURANCE:

21	Credit Insurance	Value of insured debt in state

RESIDUAL VALUE INSURANCE:

31	Residual Value Insurance	Allocate to value of underlying property

LIABILITY INSURANCE:

41	Manufacturers and Contractors	Payroll in state
42	Premises Operations	Square footage of premises in state
43	Owners and Contractors Protective	Cost of contract in state

44	Products	Receipts in state
45	Completed Operations	Receipts in state
46	Municipalities, Public Authorities and other Political Subdivisions	Number of municipalities, etc. in state
47	Child Care	Number of children in state
48	Contractual	If "stand alone" policy, value of sales in state
49	Recreational	Amount of gate receipts in state
50	Environmental Impairment	Number of units of exposure in state
51	Asbestos Abatement	Payroll in state
52	Employee/Member Benefit Program	Number of employees/ members in state
53	Special Events	Receipts from state
54	Professional Liability	Number of insureds in state
55	Errors and Omissions	Revenues generated in state
56-A	For-Profit Organization	Revenues generated in state
56-B	Not-for-Profit Organization	Number of directors and officers based in state
57	Hospital, Nursing Home, and Adult Home	Number of beds in facility plus one additional bed for each 100 outpatient visits at locations in state

58	Liquor Liability	Receipts from sales of alcoholic beverages in state
59	Railroad Protective	Miles of track in state
60	Aircraft	Number of aircraft principally hangared or principally used in state
61	Motor Vehicle	Number of motor vehicles principally garaged or principally used in state
62	Umbrella	Classification of predominant coverage; except if underlying coverages are divisible, then use underlying classifications
63	Excess Liability	If directly over primary, use underlying classifications. If over umbrella, use method in Code 62.

APPENDIX B

TAX ALLOCATION REPORT

AFFIDAVIT

#_____

1. NAME AND LICENSE NO. OF SURPLUS LINES PRODUCER

_____ _____

2. NAMES, ADDRESSES, TELEPHONE NOS., AND NAIC NOS. OF INSURERS

_____

_____

_____

3. NAME OF INSURED AND POLICY NUMBER

_____ _____

_____ _____

If purchasing group or an authorized group, list (a) name of group; (b) names of individual members for whom the allocation is being made; and (c) the policy numbers (group and individual) and certificate numbers, as applicable.

4. TOTAL GROSS POLICY PREMIUM

(PG. 2 ITEM 8, COL. 5 TOTAL) $_____

5. PREMIUM ALLOCATED TO (insert state)

_____ $_____

(PG. 2 ITEM 8, COL. 6 TOTAL)

6. AMOUNT OF PREMIUM TAX DUE TO (state)

_____ $_____

(PG. 2 ITEM 8, COL. 7 TOTAL)

NOTE: This payment shall be included with your quarterly (or annual) premium tax payment.

7. LIST ALL STATES IN WHICH EXPOSURE EXISTS AND THE CORRESPONDING PREMIUMS AND TAXES ALLOCATED TO EACH STATE (USE A SEPARATE PAGE IF NEEDED).

8. Calculation of Premium Tax Allocation:

1	2	3	4	5	6	7
Classification Codes and Methods of Allocation as indicated in the Allocation Schedule	Total Amount of Exposure	Exposure in (insert state)	% Ratio of Column 3 to Column 2	Total Gross Policy Premium	Premium Allocated to (insert state). Multiply Column 4 by Column 5	Tax Due to (insert state). Multiply Column 6 by _____
TOTALS	XXXXX	XXXXX	XXXXX	$_____	$_____	$_____

Notes:

Column 1:

(a) If policy covers more than one classification, enter each classification code separately.

(b) For any portion of the premium that is not divisible, list all coverages and specify the predominant coverage.

Columns 2 and 3:

(c) Indicate the units, insured values, numbers, etc. upon which the allocation is made. If classification code and method of allocation for all or a portion of the policy is not listed in the Allocation Schedule, attach explanatory memorandum describing the property or risk and supporting the alternative equitable method of allocation used for that portion.

Column 7:

(d) Insert tax rate.

THE FOLLOWING CERTIFICATION MUST BE COMPLETED

The undersigned certifies that the information reported in Items 1 through 8 of this form, including all attached supporting documentation, is true to the best of my knowledge, information and belief under penalties of perjury.

Date	Signature of Licensee or Sublicensee

Legislative History (all references are to the Proceedings of the NAIC).

1995 Proc. 3rd Quarter (adopted).

NONADMITTED INSURANCE MODEL ACT

The date in parentheses is the effective date of the legislation or regulation, with the latest amendments.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		ALA. CODE §§ 27-10-1 to 27-10-3 (1963/1971) [2]; §§ 27-10-20 to 27-10-38 (1963/1994) [1]; §§ 27-10-35 to 27-10-36 (1963/1971) [3]
Alaska	ALASKA STAT. §§ 21.34.010 to 21.34.900 (1984/1997) [1]	ALASKA STAT. §§ 21.33.037 to 21.33.065 (1968/1996) [2]
Arizona		ARIZ. REV. STAT. ANN. §§ 20-401 To 20-401.07 (1972/2000) [2]; §§ 20-407 to 20-420 (1954/2000) [1]
Arkansas		ARK. CODE ANN. §§ 23-65-101 To 23-65-104 (1959/2001) [3]; §§ 23-65-301 to 23-65-319 (1959/2001) [1]
California		CAL. INS. CODE §§ 1760 to 1780 (1935/2000) [1]; *See also* CAL. REVENUE AND TAXATION CODE §§ 13201 to 13222 (1993/1994) (Tax).
Colorado	COLO. REV. STAT. §§ 10-3-901 to 10-3-910 (1963/1998) [2]	COLO. REV. STAT. § 10-5-101 To 10-5-117 (1963/1999) (Includes some of model) [1]
Connecticut	CONN. GEN. STAT. §§ 38a-271 to 38a-278 (1970/1979) [2]	CONN. ADMIN. CODE §§ 38a-740-1 to 38a-740-11 (1985/1996) [1]; § 38-271 (1969/1997) [3]
Delaware		DEL. CODE ANN. tit. 18 §§ 1901 to 1919 (1953/1995) [1]
D.C.	NO ACTION TO DATE	
Florida		FLA. STAT. §§ 626.901 to 626.903 (1982/1995) [2]; 626.913 to 626.937 (1959/2001) [1]; §§ 626.938 to 626.939 (1959/2001) [3]

Georgia		GA. CODE ANN. 33-5-20 to 33-5-35 (1960/2000) [1]; § 33-5-33 (1933/1960) [3]
Guam		GUAM GOV'T. CODE §§ 43125 to 43134 [2]; §§ 43260 to 43266 (1966) ("Surplus line broker or agents") [1]
Hawaii	HAWAII REV. STAT. §§ 431:8-201 to 431:8-211 (1988/1989) [2]; §§ 431:8-300 to 431:8-320 (1988/1993) [1]	HAWAII REV. STAT. § 431:8-205 (1987) [3]
Idaho		IDAHO CODE §§ 41-1211 to 41-1232 (1961/1997) [1]; §§ 44-1233 to 41-1234 (1961/1993) [3]
Illinois	215 ILL. COMP. STATS. 5/121 to 5/121-19 (1977/1998) [2]	215 ILL. COMP. STATS. 5/445 to 5/445.1 (1980/1999) [1]
Indiana	IND. CODE §§ 27-4-5-1 to 27-4-5-8 (1969/1995) [2]	
Iowa	IOWA CODE §§ 507A.1 to 507A.11 (1967/1998) [2]	*See* IOWA ADMIN. CODE §§ 191-21.1 to 191-21.6 plus forms (1963/1999) [1]
Kansas	KAN. STAT. ANN. §§ 40-2701 to 40-2709 (1969/1992) [2]	KAN. STAT. ANN. §§ 40-246 to 40-246e (1982/1999) [1]
Kentucky	KY. REV. STAT. §§ 304.11-010 to 304.11-050 (1970/1982) [2]	KY. REV. STAT. §§ 304.10-010 To 304.10-210 (1970/2000) [1]
Louisiana	LA. REV. STAT. ANN. §§ 22:1248 to 22:1256 (1958/1999) [4] (Most of Sections 1-5 of current model).	LA. REV. STAT. ANN. §§ 22:1257 to 22:1270 (1958/1999) [1]
Maine		ME. REV. STAT. ANN. tit. 24-A §§ 2001 to 2019 (1970/1997) [1]; § 2113 (1969/1973) [3]
Maryland	MD. ANN. CODE Ins. §§ 4-201 to 4-212 (1968/1997) [2]	MD. ANN. CODE Ins. §§ 3-301 to 3-327 (1963/1999) [1]
Massachusetts	NO ACTION TO DATE	
Michigan		MICH. COMP. LAWS §§ 500.1901 To 500.1955 (1981/1996) [1,3]
Minnesota	MINN. STAT. §§ 72A.40 to 72A.44 (1967/1994) [2]	MINN. STAT. §§ 60A.195 to 60A.209 (1981/2000) [1]
Mississippi	NO ACTION TO DATE	

Missouri	MO. REV. STAT. §§ 375.786 to 375.790 (1972/1998) [2]; §§ 384.011 to 384.071 (1987/1994) [1]	*See also* MO. ADMIN. CODE Tit. 20 §§ 200-6.100 to 200-6.400 (1987/1999) (Includes allocation formula) [1]
Montana	MONT. CODE ANN. §§ 33-2-301 to 33-2-708 (1959/1999) [1]	MONT. CODE ANN. § 33-2-706 (1959/1989) [3]
Nebraska	NEB. REV. STAT. §§ 44-2001 to 44-2008 (1969/1995) [2]	NEB. REV. STAT. §§ 44-5501 to 44-5514 (1992/1999) [1]
Nevada	NEV. REV. STAT. §§ 685B.020 to 685B.080 (1997) [2]	NEV. REV. STAT. §§ 685A.010 To 685A.220 (1971/1999) [1]
New Hampshire	N.H. REV. STAT. ANN. §§ 406B:1 to 406B:15 (1967/1991) [2]	
New Jersey		N.J. REV. STAT. §§ 17:22-6.40 To 17:226.69 (1960/1996) [1,3]
New Mexico	N.M. STAT. ANN. §§ 59A-15-1 to 59A-15-10 (1985) [2]	N.M. STAT. ANN. §§ 59A-14-1 To 59A-14-18 (1985/1999) [1]
New York		N.Y. ADMIN. CODE tit. 11 §§ 27.0 to 27.23 (1994/1999) (Regulation 41) [1]; *See also* N.Y. INS. LAW §§ 2117 To 2118 (1984/2000).
North Carolina	N.C. GEN. STAT. §§ 58-21-1 to 58-21-105 (1985/1999) [1]; §§ 58-28-1 to 58-28-40 (1967/1985) [2]	
North Dakota	N.D. CENT. CODE §§ 26.1-02-05 to 26.1-02-19 (1983/1999) [2]	N.D. CENT. CODE §§ 26.1-44-01 To 26.1-44-09 (1985) [1]
Ohio	OHIO REV. CODE ANN. §§ 3901.17 to 3901.18 (1955-1956/1997) [2]	
Oklahoma		OKLA. STAT. tit. 36 §§ 1101 To 1120 (1957/1999) [1,2]
Oregon	OR. REV. STAT. §§ 735.400 to 735.495 (1987/1995) [1]; §§ 746.310 to 746.370 (1967/1995) [2]	
Pennsylvania		PA. UNCONS. STAT. §§ 40-15-101 to 40-15-125 (1992/1994) [1]

Puerto Rico		P.R. LAWS ANN. tit. 26 §§ 1001 To 1006 (1977) [2]; §§ 1007 to 1018 (1961/1980) [1]
Rhode Island	R.I. GEN. LAWS §§ 27-16-1.1 to 27-16-2.4 (1973/1999) [2]	R.I. GEN. LAWS §§ 27-3-38 To 27-3-42 (1959/2000) [1]
South Carolina	S.C. CODE ANN. §§ 38-25-10 to 38-25-570 (1988/1998) [2]	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-8-1 to 58-8-5 (1966/1978) [2]	S.D. CODIFIED LAWS ANN. §§ 58-32-1 to 58-32-58 (1966/2000) [1,3]
Tennessee	TENN. CODE ANN. §§ 56-2-601 to 56-2-704 (1955/1971) [2]	TENN. CODE ANN. §§ 56-14-101 To 56-14-117 (1969/1985) [1]
Texas	TEX. INS. CODE ANN. Sec. 101.001 to 101.301 (1967/1999) [2]	TEX. INS. CODE ANN. art. 1.14-2 (1967/1999) [1]
Utah	UTAH CODE ANN. §§ 31A-15-101 to 31A-15-102; 31A-2-309 to 31A-2-311 (1985/1995) [2]	UTAH CODE ANN. §§ 31A-15-103 To 31A-15-110 (1986/1999) [1]
Vermont		VT. STAT. ANN. tit. 8 §§ 3368 To 3370 (1968/1996) [2]; §§ 5021 to 5040 (1979/1996) [1,3]
Virgin Islands		V.I. CODE ANN. tit. 22 §§ 651 To 652 (1968/1987) [2]; §§ 653 to 667 (1968/1999) [1]
Virginia	VA. CODE §§ 38.2-4800 to 38.2-4815 (1986/1999) [1]	
Washington		WASH. REV. CODE ANN. §§ 48.15.020 to 48.15.030 (1947/1992) [2]; §§ 48.15.040 to 48.15.170 (1947/1997) [1]
West Virginia	W.VA. CODE §§ 33-3-18 to 33-3-32 (1992) [2]	W. VA. CODE §§ 33-12-10 to 33-12-25 (1957/1999) [1]
Wisconsin		WIS. STAT. § 618.41 (1971/1990) [1]; §§ 618.39, 618.47 to 618.61 (1971/1996) [2]
Wyoming		WYO. STAT. §§ 26-11-101 to 26-11-122 (1983/1991) [1]; §§ 26-12-102 to 26-12-103 (1967/1983) [2]

KEY

[1] Based on prior NAIC Model Surplus Lines Law found at 1991 Proc. I Page 952-961 (model column) or other regulation of surplus lines.

[2] Based on prior NAIC Unauthorized Insurers Model Statute found at 1990 Proc. II Page 187-191 (model column) or other regulation of unauthorized insurers.

[3] Based on prior NAIC Model Nonadmitted Insurance Act found at 1983 Proc. I Pages 923-926 (model column) or other regulation of nonadmitted insurers.

[4] Based on current Nonadmitted Insurance Model Act.

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ALLOCATION OF SURPLUS LINES AND INDEPENDENTLY PROCURED INSURANCE PREMIUM TAX ON MULTI-STATE RISKS MODEL REGULATION

The date in parentheses is the effective date of the legislation or regulation, with the latest amendments.

NAIC MEMBER	MODEL/SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama		ALA. CODE § 27-10-31 (1993).
Alaska		ALASKA STAT. §§ 21.33.055, 21.33.061 (1992/1996).
Arizona		ARIZ. REV. STAT. ANN. § 20-401.07 (1974/2000); § 20-416 (1981/1997); ARIZ. ADMIN. COMP. R20-6-207 (1974).
Arkansas		ARK. CODE ANN. § 23-65-315 (1987).
California		CAL. INS. CODE § 1775.5 (1994).
Colorado		COLO. REV. STAT. § 10-3-909; § 10-5-111 (1992).
Connecticut		CONN. GEN. STAT. § 38a-277 (1969/1997).
Delaware		DEL. CODE ANN. tit. 18 § 1917 (1988/1995).
District of Columbia	NO ACTION TO DATE	
Florida		FLA. STAT. § 626.932 (1992/1997).
Georgia		GA. CODE ANN. § 33-5-31 (1995).
Guam	NO ACTION TO DATE	
Hawaii		HAWAII REV. STAT. § 431:8-315 (1987).
Idaho		IDAHO CODE §§ 41-1229, 41-1233 (1987/1993).
Illinois	NO ACTION TO DATE	
Indiana	NO ACTION TO DATE	

Iowa	NO ACTION TO DATE	
Kansas	NO ACTION TO DATE	
Kentucky		KY. REV. STAT. § 304.10-180 (1982/2000); § 304.11-050 (1992/2000).
Louisiana		LA. REV. STAT. ANN. § 22:1265 (1984/1999); § 22:1269 (1970/1999).
Maine		ME. REV. STAT. ANN. tit. 24-A § 2016 (1991/1997).
Maryland		MD. ANN. CODE INS. § 3-324 (1983/1997); §§ 4-209 to 4-211 (1993/1997).
Massachusetts	NO ACTION TO DATE	
Michigan	NO ACTION TO DATE	
Minnesota		MINN. STAT. § 60A.198 (1981/2000); § 60A.209 (1987/2000).
Mississippi	NO ACTION TO DATE	
Missouri		MO. REV. STAT. §§ 384.051, 384.061 (1987/1989); MO. ADMIN. CODE § 200-6.400 (1992).
Montana		MONT. CODE ANN. §§ 33-2-311, 33-2-706 (1989).
Nebraska	NO ACTION TO DATE	
Nevada	NEV. ADMIN. CODE § 685A.420 (1996) (Table from model).	
New Hampshire		N.H. REV. STAT. ANN. §§ 406-B:11 to 406-B:12 (1971).
New Jersey	N.J. ADMIN. CODE §§ 11:2-34.1 to 11:2-34.6(1993/2001).	N.J. REV. STAT. §17:22-6.59 (1960/1996).
New Mexico		N.M. STAT. ANN. § 59A-14-12 (1984/1999).
New York	N.Y. ADMIN. CODE tit. 11 §§ 27.4 to 27.8 (1993/1999) (Reg. 41).	N.Y. INS. LAW § 9102 (1984/1991).

North Carolina	NO ACTION TO DATE	
North Dakota		N.D. CENT. CODE § 26.1-44-06 (1985).
Ohio	NO ACTION TO DATE	
Oklahoma		OKLA. STAT. tit. 36 § 1115 (1991/1999).
Oregon	NO ACTION TO DATE	
Pennsylvania		PA. UNCONS. STAT. §§ 40-15-121 to 40-15-122 (1992).
Puerto Rico	NO ACTION TO DATE	
Rhode Island	NO ACTION TO DATE	
South Carolina	NO ACTION TO DATE	
South Dakota		S.D. CODIFIED LAWS ANN. §§ 58-32-45 to 58-32-47 (1966/1978).
Tennessee		TENN. CODE. ANN. § 56-14-113 (1985).
Texas		TEX. INS. CODE ANN. art. 1.14-1 to 1.14-2 (1995/1999).
Utah		UTAH CODE ANN. § 31A-3-303 (1985/1992).
Vermont		VT. STAT. ANN. tit. 8 § 5036 (1979).
Virgin Islands		V.I. CODE ANN. tit. 22 § 662 (1968/1999).
Virginia	NO ACTION TO DATE	
Washington		WASH. REV. CODE ANN. § 48.15.120 (1947).
West Virginia	NO ACTION TO DATE	
Wisconsin		WIS. STAT. § 618.43 (1971/1988).
Wyoming		WYO. STAT. § 26-11-118 (1967/1983).

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Summary of State Laws — Allocation Vs. Full Premium Tax – updated after state survey 6/5/01 A = Allocation State F = Full Premium	
STATE	**Allocation/Full**
Alabama	A
Alaska	A
Arizona	A
Arkansas	A
California	A
Colorado	A
Connecticut	A
Delaware	A
District of Columbia	F
Florida	A
Georgia	A
Hawaii	A
Idaho	A
Illinois	Partial Allocation (Property Only)
Indiana	F
Iowa	A
Kansas	A
Kentucky	A
Louisiana	A
Maine	A
Maryland	F
Michigan	F
Minnesota	A
Mississippi	A
Missouri	A

Montana	A
Nebraska	Allocation in practice
Nevada	A
New Hampshire	A
New Jersey	A
New Mexico	A
New York	A
North Carolina	A
North Dakota	A
Ohio	A
Oklahoma	A
Oregon	F (Allocation as matter of practice.)
Pennsylvania	A
Puerto Rico	A (Taxes out of state brokers on risk, or residents, located or to be performed in Puerto Rico wherever it was negotiated.)
Rhode Island	F
South Carolina	F (Allocation as a matter of practice)
South Dakota	A
Tennessee	A
Texas	A
Utah	A
Vermont	A
Virginia	A
Virgin Islands	A
Washington	A
West Virginia	A

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Supreme Court, U.S.
FILED

OCT 12 2001

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(4)

No. 01-442

IN THE

Supreme Court of the United States

CAROLE KEETON RYLANDER, Comptroller of Public Accounts of the State of Texas, and JOHN CORNYN, Attorney General of the State of Texas,
Petitioners,

v.

THE DOW CHEMICAL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Third Court of Appeals of Texas

Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioners

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25 pp

Question Presented

Whether *Todd Shipyards* admits of exceptions for independently procured insurance taxes that (i) are in the nature of a compensatory use tax; (ii) are non-discriminatory in whole or in part with respect to similar transactions occurring within the taxing State; (iii) are placed with affiliated insurance subsidiaries; or (iv) cover insureds within an affiliated group that includes subsidiaries organized or having a commercial domicile within the taxing State.

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission[2] is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[3] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

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[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its members States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

[2] Congress has recognized the Commission as facilitating state taxation of interstate commerce. Mobile Telecommunications Sourcing Act, Pub. Law 106-252, 114 STAT. 626, 628 and 629 (2000), codified at 4 U.S.C. §§ 119(a)(2)C) and 120(b)(1).

[3] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee.[4] *See* D. Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, 17 STATE TAX NOTES 1295 (November 15, 1999). The States' primary interest in forming the COMPACT was to safeguard State taxing power in the context of multijurisdictional commerce, an essential governmental power if the States were to fulfill their constitutional role.

The Commission reviews state decisions that preempt or restrict state tax sovereignty, because when wrongly decided they can have a perverse influence over the development of the law in the remaining States.

The Commission views *Dow Chemical Co.* v. *Rylander*, 38 S.W.3d 741 (Tex. App.—Austin 2001, pet. denied), with considerable concern. Without a clear congressional mandate, the decision preempts the essential taxing power of a State, departs from neutrality by favoring interstate and international commerce over intrastate commerce, and, in practical effect, ensures that a transaction that is normally subject to tax in the several States will not be taxed at all.

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[4]The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

If injurious preemption without a clear congressional mandate were not enough, the decision also mechanically relies upon *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962). The holding of *Todd Shipyards* is markedly more limited than many suppose and is of questionable pedigree. The hasty application of *Todd Shipyards*, as occurred in this matter, also has the unwarranted potential to broaden the impact of the case.

Finally and this is important to appreciating the need for review, the injurious effect of this case to federalism arises from the understandable failure of the Texas Court of Appeals to examine factual differences that could have distinguished *Todd Shipyards*. The failure is attributable to the respect the Texas Court of Appeals gave to the precedent of the Supreme Court. *Dow Chemical Co.* v. *Rylander*, 38 S.W.3d at 746) (bound by Supreme Court precedent citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). A full examination of the factual record would have afforded a reasonable opportunity to catalogue possible differences from *Todd Shipyards* and thereby avoid an unwarranted, expansive application of that decision.

ARGUMENT

THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS IN ORDER TO REVISIT *TODD SHIPYARDS*.

The Commission supports review because it is time to reassess the holding in *Todd Shipyards* and determine whether that decision would benefit from

clarification. This case presents a well-founded basis for that reassessment. As noted by the Texas Court of Appeals, only the Court has the freedom to examine its precedent. If there is to be any relief from unwarranted interpretations of *Todd Shipyards*, the States necessarily are totally dependent upon the Court's willingness to manage its jurisprudence. Although there are often intense national and international pressures that demand a convenient national solution for many problems, this matter presents a specific instance where federal preemption is not well founded in fact or law.

A. *The Clear Statement Doctrine Applies, Because The Texas Ruling Preempts Essential State Taxing Power, Favors Multijurisdictional Commerce Over Intrastate Commerce, And Practically Ensures Large, Sophisticated Insureds Will Avoid Normal State Taxation In The Acquisition Of Insurance.*

The decision at issue has obvious negative consequences for the States that would be avoided through the application of the Court's clear or plain statement doctrine. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991). The decision by mechanically relying upon *Todd Shipyards* ignores fundamental constitutional values that are well established in the jurisprudence of the Court.

The Texas Court of Appeals held that the taxing power of the State of Texas is preempted by congressional legislation. Yet, state taxing power is an essential attribute of sovereignty of the constituent States within our Federal Union. Whether construing the Constitution or a congressional statute, the Court has cautioned against quick and superficial findings that the state taxing

power is barred. *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995), *quoting Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."); *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 345 (1994); *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

The decision further favors the acquisition of insurance outside of the taxing State, whether in interstate or international commerce, in order to escape the imposition of a tax that would otherwise apply in the context of the acquisition of the insurance within the State. *See Todd Shipyards*, 370 U.S. at 458 (Black, J., dissenting).

Finally, the decision turns its back on a basic constitutional value that multijurisdictional commerce should pay its fair share of state taxes. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938)("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way.' "). In effect, the decision allows large, sophisticated multijurisdictional insureds to avoid normal state taxes associated with insurance altogether. This result obtains because the decision rejects apportionment, a method for determining the tax due by the measure of the tax base that is connected with the taxing State. And this matter

apparently does not raise any question of fair apportionment, App. B7, or duplicative taxation. The rejection of apportionment occurs even in the face of insurance taxation being a substitute for an income tax, J.T. Taylor, *Whither* Todd Shipyards*: State Power to Impose Premium And Self-Procurement Taxes*, 21 STATE TAX NOTES 585 (2001), that is normally apportioned. Instead the decision favors taxation based upon artificial concepts like the "place of contracting" or "place of payment of the premium." These concepts facilitate tax planning to ensure that the insurance coverage is associated with a single jurisdiction that does not seek to exercise any taxing authority with respect to the insurance.

The rejection of apportionment is surprising, because the Court does not necessarily favor taxation by allocation resulting in a single taxing jurisdiction. *Cf. Mobil Oil Corp.* v. *Comm'r of Taxes*, 445 U.S. 425, 443-46 (1980) (Constitution does not favor taxation based upon corporate domicile; "'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction.").

We suggest that any of these adverse consequences would counsel clear caution in finding Texas is barred from imposing its independently procured insurance tax. Indeed, the Court has counseled against decisions that reach for an interpretation of a congressional statute that curtails traditional state power without a clear and manifest congressional purpose. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). While the Court has developed the clear statement doctrine in more saturated colors since its decision

in *Todd Shipyards*, *e.g.*, *Gregory* v. *Ashcroft*, *supra*, *ACF Industries*, *supra*, the very statute under consideration here sought to *empower* state tax authority and warned against construction of state tax preemption that was not expressly stated. 15 U.S.C. §1012(b) (1994); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 430-31 (1946) (Commerce Clause exceptions to state regulation and taxation of insurance were to be "expressly provided for.").

B. The Direction Of The Texas Court of Appeals To Enter Summary Judgment For The Taxpayer Was Erroneous And Affords The Court An Opportunity To Clarify Todd Shipyards.

1. *Todd Shipyards* Did Not Identify Any Clear Statement Establishing Congressional Intent To Preempt The Texas Tax.

The reliance of the Texas Court of Appeals upon *Todd Shipyards* was misplaced, because, contrary to this Court's own assertion in *Todd Shipyards*, there is no clear statement that establishes a congressional intent to preempt the Texas tax. Regardless of the propriety of resorting to legislative report language in the face of a clear and unambiguous statute, *Ex parte Collett*, 337 U.S. 55, 61 (1949), the actual legislative report language is inconsistent with the Court's conclusions about Congress' arch-based design. Further, the Court's analysis of the frozen trilogy, *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346 (1922), and *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77 (1938), is incomplete.

The report language says no more than the legislation is restoring the *status quo ante.* The McCarran-Ferguson Act did not increase or detract from state powers as they existed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). (Expressions of this kind of neutral understanding are common when Congress changes the regulatory landscape that implicates state sovereignty. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 §101(b), Pub. L. 103-328, 108 STAT. 2338, 2341 (1994), 12 U.S.C. 1831u(c)(1)(A) (1994); Telecommunications Act of 1996 §602(c), Pub. L. 104-104, 110 STAT. 56, 143-44 (1996), note to 47 U.S.C. §152 (1994 supp. 5).)

While Congress stated state regulation and taxation was subject to the "controlling decisions of the Court," an ordinary, plain interpretation of that phraseology would be that the Supreme Court's subsequent decisions would also control. The report language did *not* say, "the controlling decisions of the Supreme Court *as they now exist.*"

The absence of any stated intention to freeze the Supreme Court's due process interpretations in time mirrors the jurisprudential context surrounding the enactment of McCarran-Ferguson. The holding of *South-Eastern Underwriters* remained intact: state regulation and taxation of insurance remained within the ambit of Congress. Congress at anytime under its newly recognized Commerce Clause powers could step in.

At most, the significance of the report language is reflected in the statement, "a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or

corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3. But that statement is a far cry from stating that a State was powerless to tax the *insured* in all respects.

In addition to a problematic interpretation of legislative report language, *Todd Shipyards* did not completely analyze the precedent that Congress purportedly wished to enshrine. The holdings of the frozen trilogy of *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut General* are limited and do not support preemption in this case.

Allgeyer involved criminal sanctions imposed to prevent a resident from procuring insurance outside the State from a non-admitted carrier. The State in *Allgeyer* thus attempted to regulate, that is, prohibit, by criminal sanction, activities occurring outside its borders, something a State is powerless to do under the Due Process Clause.

St. Louis Cotton Compress, likened to *Allgeyer* by Justice Holmes, involved an attempt by a State to impose a tax greater than what was imposed on an authorized insurer. This differential amounted to a practical impediment to acquiring insurance outside of the taxing State. "The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State." *St. Louis Cotton Compress*, 260 U.S. at 348-49. Thus, *St. Louis Cotton Compress* also involved a taxing State attempting to regulate outside conduct.

(The Court's explanation of *St. Louis Cotton Compress* in *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U.S. 87, 95 (1927), is not pertinent to this point. First, the Court in *Todd Shipyards* honored under supposed congressional direction the frozen trilogy without reference to other due process decisions. Thus, the Court disregarded *Osborn* v. *Ozlin*, 310 U.S. 53 (1940), and *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943). *Todd Shipyards*, viewed *St. Louis Cotton Compress* as standing on its own. Alone *St. Louis Cotton Compress* clearly relies upon the discriminatory tax aspect to reach its decision. Second, Justice Holmes, author of *St. Louis Cotton Compress* opinion, dissented from the majority's view as to whether the decision was dependent upon a discriminatory tax regime. *Tobacos*, 275 U.S. at 99. See also Justice Black's observation during the oral argument in *Todd Shipyards* that subsequent statements in the *Tabacos* case fit more comfortably into Justice Holmes' view of the matter than the majority's. Tr. 38.)

Finally, *Connecticut General* did not even involve taxation of the insured. California, the taxing State, attempted to tax directly the operations of the insurer that were described as occurring outside of, and unrelated to, the taxing State.

In light of these considerations the Court's characterization of the frozen trilogy in *Todd Shipyards* is incomplete. While these cases may have had some sanctity in the eyes of Congress, they do not control the disposition of this case.

2. The Holding In *Todd Shipyards* Is More Limited Than Conventional Wisdom Suggests.

Todd Shipyards itself really says no more than a State may not seek to tax or regulate a "transaction" occurring outside the State. Understood in this light, the principle is unremarkable. *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995); *State Tax Commission* v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 605-06 (1963) (*per curiam*). Reference to arguments of counsel and the Court's reasoning will document this understanding.

The State in *Todd Shipyards* sought to uphold its tax as a regulation governing "the placing of insurance by resident insureds with unauthorized insurers on risks located in Texas," Pet. Br. 7-8, that is, "to reduce the number of owners of Texas risks who purchase insurance from unauthorized companies by making it *more* expensive to do business with unauthorized insurance companies." *Id.* at 10 [emphasis added]. *See also* Tr. Oral Arg. at 21. The State conceded that in order to prevail *St. Louis Cotton Compress* would have to be overruled. *Id.* at 11-12.

The taxpayer in *Todd Shipyards* viewed the matter as an attempt by the State to tax an event, whether it was described as the payment of the premium or the formation of an insurance contract, that occurred wholly without the taxing State. Resp. Br. 2-3, 22. *See also* Tr. Oral Arg. at 33-34 ("This is a tax on a premium payment" and this taxable event only occurs in New York City.) and 43-44 (one pivotal distinction is whether the tax is on a Texas or New York contract).

The opinion in *Todd Shipyards* reflects the due process principle that bars state taxation or regulation of events occurring outside the State. First, the Court characterizes the Texas tax as a "tax on premiums paid out-of-state on out-of-state contracts." 370 U.S. at 453. Second, the Court observes, "The insurance transactions involved in the present litigation take place entirely outside Texas," and thereafter places extraordinary emphasis on the *insurer's* relationship to the taxing State, when superficially at least the tax was on the insured and not the insurer. *Todd Shipyards*, 370 U.S. at 454-55. Third, the Court quotes the language in the legislative report assessing the meaning of the frozen trilogy. This language is critical, because it is Congress' understanding of what it was supposedly preserving by referencing the frozen trilogy. "[A] State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." 370 U.S. at 455-56, quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3. Fourth, the Court makes reference to the *amicus* brief of a small insurance company by noting "how severe the impact would be on small insurance companies should the old rule be changed." 370 U.S. at 457. The concern of the small insurance company was the risk of multiple taxation and conflicting regulation, again reflecting regulation and taxation of a transaction outside of the State. Br. Church Fire Ins. Corp. and Catholic Relief Ins. Co. of American at 13.

3. This Matter Is Both Legally And Factually Distinguishable From *Todd Shipyards* And Affords A Reasonable Opportunity To Clarify That Decision.

If *Todd Shipyards* holds no more than a State may not exercise extraterritorial domain by taxing or regulating out-of-state transactions, the appropriate question is whether *Todd Shipyards* applies because the State of Texas has attempted to do that here. We submit that the meager record of this case that was disposed of on cross motions for summary judgment does not support that conclusion.

In fact, the record suggests potential differences that the Texas Court of Appeals ignored due to the binding effect of *Todd Shipyards*. These differences call for plenary consideration of all pertinent details in a trial proceeding conducted on remand. In assessing the record for the potential differences, it is important to recall that the taxpayer has the burden to establish any exemption, including exemptions based upon constitutional principles. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 537 (1951); *see also, General Motors Corp.* v. *Washington*, 377 U.S. 436, 441-42 (1964); *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 175-76 (1983). Lapses in the record are generally borne by the taxpayer.

a. The Texas Tax Does Not Reach Out-Of-State Transactions.

One obvious difference here is that the State of Texas embraces the idea that the independently procured insurance tax resembles a compensatory use tax. Pet. Writ of Cert. at 13-14. In *Todd*

Shipyards Texas apparently ran away from that characterization. Tr. Oral Arg. at 19-20. That reality undoubtedly contributed to the perspective that the majority held that the tax was a tax on the formation of the contract of insurance and the payment of the applicable premium, rejecting in the process Justice Black's views.

The validity of a compensatory use tax is familiar territory to the Court. *See Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937) (application of discriminatory compensatory use tax to property acquired out of state upheld to preserve tax neutrality). We see nothing unusual in applying a compensatory use tax in the context of insurance.

Texas's change of heart this time around is buttressed by a change in the language of the Texas tax. Former Section 2(e) of Article 21.38 of the Texas Insurance Code under which *Todd Shipyards* was decided, 370 U.S. at 453 n.2, was suggestive of a tax on *premiums paid for the insurance.* See Pet. Br. at 2, *Todd Shipyards.* The current tax under Tex. Ins. Code §101.252(a) and (b) appear to be on a value that is measured by the portion of the premiums that are attributable to the risk or exposure located in Texas.

This difference in language, however subtle, is similar to fine distinctions on taxability that the Court has made in an analogous circumstance. *Compare McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944) (destination or consuming State could not impose a sales tax with respect to a sale that did not occur within its boundaries), *with General Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335 (1944) (but consuming State could impose a use tax with

respect to the article acquired by a sale occurring outside its boundaries).

While Dow Chemical may wish to contest any resemblance to a compensatory use tax, that issue is not one for the Court to resolve at this stage without first hearing from the Texas courts. Review at this stage may reasonably be limited to determining whether *Todd Shipyards* admits of an exception for an insurance tax in the nature of a compensatory use tax. This kind of decision would be useful to the States. Remand on this ground would free up the Texas courts (and other States' courts and legislatures) to consider whether the insurance tax imposed on independently procured insurance was of a character to withstand a holding of *Todd Shipyards* that was more limited in aspect than some may assert. *See* Taylor, *Whither* Todd Shipyards, 21 State Tax Notes at 590.

b. The Texas Tax Does Not Regulate Out-Of-State Transactions.

As noted above, pp. 9-10, *St. Louis Cotton Compress* characterizes a tax as regulatory with respect to out-of-state transactions when the tax is discriminatory. By imposing a discriminatory insurance tax, the taxing State imposes a penalty for securing insurance outside of the State. While the record is not fully developed on this issue, review of this matter could lead to a remand to allow the Texas courts to determine whether, and/or to what extent, the independently procured insurance tax is discriminatory. Remand on this ground would be helpful to the States, because it would signal to the States that the discriminatory aspect of an indepen-

dently procured insurance tax is a critical element in the analysis to apply *Todd Shipyards*.

Assessing the level, if any, of discrimination also would allow consideration of *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tabacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 40 (1990) (due process remedy for unconstitutional discriminatory tax may be cured by refunding the discriminatory portion of the tax). The Texas courts, to the extent discrimination is raised, should be allowed the first instance to make the determination of its possible existence and thereafter to fashion appropriate relief. *McKesson*, 496 U.S. at 51.

c. Other Facts Suggest That The Texas Tax Does Not Tax Or Regulate Out-Of-State Transactions.

Additional facts in the record suggest that this matter should be reviewed for a possible remand in order to apply a different understanding of *Todd Shipyards*.

First, one of the insurers, Timber, and later Dorintal, App. B68-69, are apparently insurance subsidiaries of Dow Chemical. App. B12. These subsidiaries may well be located in Bermuda. App. B12, B46. A remand after review would allow the Texas courts to consider whether the relationship of the insurance subsidiaries to the Dow Chemical enterprise took the insurance transactions out from under *Todd Shipyards*. Cf. *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 440 (1938) (Commerce power is not defined by reference to separately organized subsidiaries of an enterprise); *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 574

(1997), *quoting Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979). ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.").

Second, the technical term "insureds" is defined under both the Starr and the Timber (later Dorintal) policies to include defined subsidiaries of Dow Chemical. App. B40-41, B48. The record does not disclose whether any of these "insureds" are companies organized or having their commercial domicile in Texas. In light of the identity of possible insureds, the out-of-state payment of all possible covered losses hardly should be accorded significance in determining the possible application of the Texas tax. Arranging for loss payment out-of-state might be well nothing more than using an agent to cover the insured's Texas loss. We also note in this regard that the Timber (later Dorintal) policy contains coverage that is specified to Texas in particular. App. at B54, B72.

CONCLUSION

In mechanically applying *Todd Shipyards* and directing entry of a summary judgment the Texas Court of Appeals has applied an incorrect legal standard. The Court's acceptance of this matter for review offers a reasonable opportunity to delineate additional factors that make *Todd Shipyards* inapplicable in these circumstances. Due to the Court's own requirements that govern adherence to existing precedent, only this Court is in a position to indicate admitted exceptions to *Todd Shipyards* that are raised in this case. Without taking this matter for review, *Todd Shipyards* will continue to

challenge state courts and prevent States from ensuring that the commerce of insurance bears it fair share of state taxes. The willingness of the Court to reconsider one of its problematic precedents can only increase the institutional authority of the Supreme Court of the Land.

RESPECTFULLY SUBMITTED,

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(5)

No. 01-442

IN THE

Supreme Court of the United States

CAROLE KEETON RYLANDER, Comptroller of Public Accounts of the State of Texas, and JOHN CORNYN, Attorney General of the State of Texas,

Petitioners,

v.

THE DOW CHEMICAL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD COURT OF APPEALS OF TEXAS

BRIEF OF AMICUS CURIAE

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INTEREST OF *AMICI CURIAE*

Amici Curiae State of Nevada, and ten other States, have a vital interest in this case, as it implicates the ability of States to regulate and tax the business of insurance, and affects the uniformity and consistency of that taxation between the States. *Amici* are concerned with the uncertainty created by State court decisions such as the one being appealed here as to the scope of State authority to regulate and tax the business of insurance. The States have been working towards establishing a nationwide allocation system for insurance taxes, which includes taxes based on the location of the risk or the location where the risk is to be performed. State taxes paid on insurance premiums constitute a large source of revenue for the States. In Nevada, this is the third largest source of state tax revenue. All States have the same interest in rationally balanced revenue sources and in promoting fairness in their licensed insurance markets. At this time in our nation's history, sources of revenue are more important than ever.

Due process jurisprudence has evolved through the years since the Court's decision in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). This Court's more recent decisions construing the McCarran-Ferguson Act have also demonstrated evolution in the application of that act. Based on the changing economic realities of the insurance business and today's commerce, the holding in *Todd Shipyards* should no longer be rigidly applied to States' regulation and taxation of insurance.

Without clarity and certainty about *Todd Shipyards*' current validity, uncertainty now exists as to the ability of a state to tax insurance premiums based on the location of the risk or its place of performance. *Amici* believe that *Todd Shipyards* should be expressly overruled to clear up any doubt as to the current status of the jurisprudence of due

process as applied to the taxation and regulation of insurance. However, if location of the risk alone is not sufficient to allocate taxable value to a taxpayer with nexus, then the States need guidance as to what other allocation could be used.

SUMMARY OF ARGUMENT

Over two-thirds of the States impose a tax on insurance premiums based in some manner on the location of the insured risk in that state. Many states, like Nevada, impose a tax on the premium paid by the insured when the insured procures insurance outside the state from an insurer unauthorized to transact business in that state. These states look to the connection of the insured with the taxing state, the revenues obtained in the State by the insured related to the risk, and to the protections and benefits offered to the insured and the insured's property, to determine the constitutional limits of taxing the insured on the insurance premiums paid to the insurer. This process is commonplace in most states, and works well, as the location of the risk or the performance is a fairly easy determination to make. If *Todd Shipyards* is interpreted as the Texas Third Court of Appeals did in *Dow Chemical Co. v. Rylander*, 38 S.W.3d 741 (Tex. Ct. App.-Austin 2001, pet. denied), this process will be thrown into disarray and uncertainty.

Basing the tax on the location of the risk or its performance is logical, as the location of the risk or its performance can readily be ascertained. If the policy is insuring multi-state risks, the premiums and tax can be properly allocated among the involved states. Additionally, where the insurer is not authorized to transact business in the taxing state, but the insured has sufficient contacts with the taxing state for the taxing state to have jurisdiction over the insured, it makes sense to have the insured pay the premium tax directly to the state. The insured is the one with the ultimate burden of paying an insurance premium tax

regardless of whether the tax is remitted by the insured directly to the state or the tax is collected and remitted to the state by the insurer.

The States have been moving towards a more uniform system of insurance regulation and taxation that is based on the location of the risk. Finding a way to rationally balance revenue sources while promoting fairness in licensed insurance markets brings benefits to the States, by giving more certainty to amounts of revenues, while bringing certainty to insurers as well. Additionally, these benefits also inure to the consumers of insurance. When there is more certainty, there are more efficiencies that reduce the ultimate obligation to the consumers.

However, the strict application of the holding in *Todd Shipyards* to today's insurance markets creates a result that actually frustrates the movement toward uniformity. At the very least, the application of *Todd Shipyards* in the case below causes uncertainty, as other state courts have found the holding of *Todd Shipyards* inapplicable to certain insurance transactions or policies. Additionally, other courts have found that *Todd Shipyards* has been abrogated by subsequent decisions of this Court dealing with due process and the McCarran-Ferguson Act. Therefore, *Todd Shipyards* should be expressly overruled or at the very least limited to those circumstances where the taxpayer does not have sufficient contacts with the taxing state to satisfy Due Process concerns. However, such a limitation should not prevent the Court from overturning the lower court's decision as to the facts of this case, as the insured and the subject of the tax did have sufficient contacts with Texas, the taxing state, for the imposition of the tax at issue.

ARGUMENT

I. THE TEXAS COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

In *Todd Shipyards*, the Court held that Texas did not have the power to impose an insurance premium tax upon the insured, where the insured risk was located in Texas, but the insured and the insurer were not residents of Texas. The Court applied a formalistic analysis, looking to the contacts of the insurer with Texas, and where the insurance "transactions" took place. The insurance agreement was negotiated and paid for outside Texas, the policies were issued outside Texas, and all losses arising under the policies were adjusted and paid outside Texas. The insurer had no office or place of business in Texas, did not solicit business in Texas, had no agents in Texas, and did not investigate risks or claims in Texas. Based on these facts, the Court held that taxing the nonresident insured in these circumstances violated the due-process clause.

However, since that decision, this Court's development of due process jurisprudence has shifted away from a formalistic analysis to one more flexible and practical, one that could take into account the economic realities of the insurance business. The Court set aside the formalistic rule of prohibiting the taxation of interstate commerce if the incidence of the tax was on the "privilege of doing business." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Then the Court took another step in the same direction when it made a clear distinction between a due-process analysis and a commerce-clause analysis, and rejected the prior holding in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), regarding the requirement of physical presence in the state as

a prerequisite to the right to tax pursuant to the due-process clause. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

In *Quill*, the Court clearly stated that the test for due process analysis was only that a corporation have "minimum contacts" with the taxing state. *Id.* at 306-309. The intent of the Due Process Clause is to ensure fairness and notice to the corporation that its contacts with the State cause it to be subject to tax. *Id.* at 308. The presence in a state necessary to satisfy the Due Process Clause is comparable to that needed to support a state court's jurisdiction over a defendant in a civil matter. *Id.* at 307-308. As articulated in cases such as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), that standard is met if the entity purposefully directs its activity into a jurisdiction. *Quill* further clarified that a corporation "may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill* at 313.

The Court has stated that the purpose of due process requirements is sufficient notice to the taxpayer that it will be taxed. *Quill* at 308. In the case being appealed here, the State of Texas is not placing a tax on someone who did not have nexus with the state. Instead, the insured has substantial contacts with the taxing state, and hence the taxpayer has sufficient notice that it is subject to Texas' taxing jurisdiction. The taxing state has a legitimate interest in regulating the insurance industry for the protection of its residents, as to the security of the insured, but also as to any other residents who may be the ultimate beneficiaries of a claim against the insured's insurance company. *See, e.g., Gage & Tucker v. Director of Revenue*, 769 S.W.2d 119, 126 (Mo. 1989), where the court found sufficient connection in the contract between the insurer and the taxpayers/insureds and the state to find due process was not violated by the assessment of a tax imposed on the insured.

It is the insurance on an insured risk that is having its value taxed. The risk is present in the taxing state. The State's power to tax an individual's or a corporation's activities is justified by the protection, opportunities and benefits the State confers on those activities. *Allied Signal, Inc. v. Dir., Div. Of Taxation*, 504 U.S. 768, 778 (1992). The state confers benefits upon the insured, as related to the insured risk, "by the fact of being an orderly, civilized society." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). The state has given opportunities, protection, and benefits related to the insured risk by affording access to its courts for both the insured and any possible victims that would have a claim against the insured. The state also affords protection to the insured risk through its law enforcement and fire departments, and provides the general benefits of maintaining an orderly society.

An owner of property should give appropriate support to the government that protects that property. *Virginia v. Imperial Coal Sales Co., Inc.*, 293 U.S. 15, 20 (1934). Here, the insured risk is located in the taxing state. The insured is being taxed on the insurance covering these risks because the real economic value of the insurance is as inextricably connected with Texas as the property and business interests being insured. The insured has purchased intangible rights protecting its property and business interests in Texas. The duty owed to the government "is not less when the property is intangible than when it is tangible." *Id.*

The value being taxed in this case is extremely important to businesses and to States. The modern trend in due process jurisprudence is to allow taxation based on the location of the insured risk in this case, as the insured and the insured risk have more than sufficient "minimum contacts" to meet due process concerns.

II. STATE COURT DECISIONS CREATE UNCERTAINTY AS TO THE STATE OF LAW ON TAXATION OF INSURANCE AND GUIDANCE IS NEEDED FROM THIS COURT.

It is imperative for the States that the current state of law regarding the taxation of insurance be clarified. State courts have interpreted *Todd Shipyards* in a variety of ways, and sometimes based on distinctions that seem meaningless in today's world. *Compare Dow Chem.*, 38 S.W.3d at 745 with *Associated Elec. & Gas Ins. Serv. v. Clark*, 676 A.2d 1357, 1361 (R.I. 1996), and *Lakehead Pipe Line Co., Inc. v. Amer. Home Assurance Co.*, 981 F. Supp. 1205, 1214-15 (D. Minn. 1997). Shortly after this Court decided *Todd Shipyards*, one state court stated that *Todd Shipyards* should not be read as forever limiting state regulation to the type existing at that time and forever barring expansion of the regulation of the insurance industry by states to meet the ever-growing social needs and problems of modern civilization. *Ministers Life & Casualty Union v. Haase*, 141 N.W.2d 287, 292 (Wis. 1966). This was in 1966, only four years after T*odd Shipyards* was decided. How much more true today is it that the concept needs to be flexible, and must be adjusted as the world changes, not forever fixed in one spot for several decades.

The Rhode Island Supreme Court has concluded that *Todd Shipyards* has been superseded by this Court's holding in *Quill* and state cases that distinguished *Todd Shipyards*. *Associated Elec. & Gas Ins. Serv. v. Clark*, 676 A.2d 1357, 1361 (R.I. 1996). *See also Howell v. Rosecliff*, 245 A.2d 318, 324 (N.J. 1968) ("[i]nsurance is so essential a part of the area of a State's primary responsibility that the State's power should not depend upon where the parties choose to contract for the insurance or to pay the loss. The State's interest and its responsibility to its citizens should be enough to support regulation and taxation of policies relating to the risks within

its jurisdiction"); *People v. United National Life Ins. Co.*, 427 P.2d 199 (Ca. 1967), *appeal dismissed for want of a substantial federal question*, 389 U.S. 330 (1967) (if there were any activity within a State either in the making or in the performance of the contract, the State could exercise its governmental powers to further its undoubted interests in insurable risks within its borders.)

If the Court does not expressly overrule *Todd Shipyards*, the very least that is necessary is guidance as to how the holding in that case applies to insurance contracts today that may have many different aspects, occurring in several different states.

III. THE CHANGES IN BUSINESS, COMMERCE AND INSURANCE REQUIRE OVERTURNING OR AT LEAST MODIFICATION OF THE HOLDING IN *TODD SHIPYARDS.*

The business of insurance changed when the mobility of people, companies and property increased, and also when ease of communications of several different types also increased. These factors militate against looking at where contracts are negotiated, from where payments are made, and whether the insurer must investigate claims in the taxing state. Instead, the easiest method of determining what state should tax the insurance is basing it on the location of the risk or location of its performance, as most states do.

Both before and after the Court's decision in *Todd Shipyards*, the Court recognized the importance of states' interest in the taxation and regulation of insurance and also the fact that insurance activities are not confined to just within one state's boundaries. *See Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) (a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the state action may have repercussions beyond state lines); *Hoopeston Canning*

Co. v. Cullen, 318 U.S. 313, 316 (1943) (great weight should be given to the consequences of the contractual obligations in the state where the insured resided and the degree of interest that the state had in seeing that those obligations were faithfully carried out); *Travelers Health Asso. v. Virginia*, 339 U.S. 643, 647-648 (1950) (the Court stated where insurance business activities reach beyond one state and create relationships and obligations in another state, courts should not have to resort to fictions in order to sustain jurisdiction); *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 182 (1964) (the Court recognized that insurance companies do not confine their activities and obligations within a particular state's boundaries).

The insurance industry is already moving towards the direction that is being asked by the petitioner, as this also appears to be the trend of the Court in its decision on due process. Therefore, the concerns that were compelling to the Court when it decided *Todd Shipyards* 40 years ago are not the same today. "[I]t is impossible to compare our present world to the one that existed at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *United States v. Fabe*, 508 U.S. 491, 508 (1996). The petitioner was not allowed "to turn back the clock." *See id.* The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Id* at 445.

The fact that the insurance industry has tried to provide a uniform method for taxation of insurance

premiums indicates a concern for being consistent, which is met where the States base their tax upon the location of the risk. When States are confined to trying to determine if any part of the insurance "transaction" took place in a particular state, such as where was the insurance negotiated, where were the policies issued, where are losses adjusted and paid, does the insurer have an obligation to investigate a claim in that state depending on the type of insurance policy, uncertainty is created as to the proper allocation of the tax. However, basing the tax on the location of the risk is the most certain and efficient way of determining where it is appropriate to regulate and tax. In negotiations, it is difficult at times to determine where it was negotiated, especially when negotiated by mail or via the Internet, or it could be negotiated in more than one state. The facts of each situation may be difficult to determine or to prove.

The Court in *Todd Shipyards* stated that it had the freedom "of course" to change its decisions on the constitutionality of laws. *Id.* at 457. However, the Court felt constrained by the legislative history in light of the fact that the insurance industry had relied on this policy since 1897. The Court stated that it had been advised how severe the impact of a change of policy would be on small insurance companies should the old rule be changed. Based on these facts, the Court was "loath" to change the validity of specific prior decisions. *Id.* at 457. Here, however, the States have moved towards a uniform method of taxation of insurance, based on the location of the insured risk. A more uniform method of taxation will benefit the insurance industry as well as the consumers of insurance when certainty is created, and thus ultimately more efficiency in the administration of insurance, both by the States and the insurers.

IV. PRACTICAL ECONOMIC REALITIES REQUIRE THE OVERTURNING OF *TODD SHIPYARDS.*

As far back as its decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878), this Court recognized that rigid categories for due process analysis cannot accommodate some necessary litigation. The Court has made adjustments over the years as deemed necessary to accommodate changes in our world. The advent of automobiles, which increased the incident of individuals causing injury in states where they were not subject to in personam actions, was one reason for modification of the territorial limits on jurisdictional power. *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977). The Court found that the test of "fair play and substantial justice" should be applied. *Id.* at 206.

In *Complete Auto*, the Court found that the "Spector rule" had no relationship to economic realties, and was unsatisfactory in its operation in recent cases. *Complete Auto*, at 279, 285. The Court overruled the rule of *Spector Motor Service* that a state tax on the "privilege of doing business" is per se unconstitutional when it is applied to interstate commerce, and the case was overruled. *Id.* at 288-89. In *Quill*, the Court noted that Due Process jurisprudence has evolved in the 25 years since *Bellas Hess*. *Id.* at 306-07. The Court looked to "modern commercial life" and modified its holding in *Bellas Hess* because of developments in the law of due process. *Id.* at 308.

Here, we have the principles of *Todd Shipyards* being applied 40 years later. Here, "commercial life" requires the prior holding of Todd Shipyards to be overruled as it has been superseded by new developments in constitutional law. *See Quill* at 308; *Todd Shipyards* at 457. At the very least, the States need guidance and direction of how to properly allocate tax on insurance if the location of the risk or its

performance is not the most appropriate basis for the taxation.

CONCLUSION

For the reasons stated above, *amici* join in the petitioner's request that the petition for writ of certiorari be granted.

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